Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26 SEPTEMBER 2, 1992 No. 36

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AVAILABILITY OF BOUND VOLUMES
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 145

(T.D. 92–80)

IMPORTATION OF LOTTERY MATERIAL FROM CANADA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect a provision of the United States-Canada Free-Trade Agreement Implementation Act of 1988, amending 19 U.S.C. 1305, to allow for the importation of certain lottery matter printed in Canada for use in connection with a lottery conducted in the U.S.

EFFECTIVE DATE: January 1, 1993.

FOR FURTHER INFORMATION CONTACT: William Wagner, Office of Trade Operations (202) 566–7090.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 305 of the Tariff Act of 1930, as amended (19 U.S.C. 1305), generally provides that the importation into the United States of certain articles deemed to be immoral, including lottery material from all countries, is prohibited. This statutory exclusion provision is reflected in § 145.51(a)(5) of the Customs Regulations (19 CFR 145.51(a)(5)), which broadly described this subject matter as "Lottery matter."

On January 2, 1988, the United States and Canada entered into a bilateral reciprocal free trade area agreement called the United States-Canada Free-Trade Agreement (CFTA). The CFTA became law on September 28, 1988, pursuant to the United States-Canada Free-Trade Agreement Implementation Act of 1988 (the "Act"), Pub. Law 100–449, 102 Stat. 1851. Section 206 of the Act provides that, effective January 1, 1993, § 305(a) of the Tariff Act of 1930 (19 U.S.C. 1305 (a)) is amended to provide that this section shall not apply to any lottery ticket, printed pa-

per that may be used as a lottery ticket, or advertisement of any lottery, that is printed in Canada for use in connection with a lottery conducted in the U.S.

This document amends 19 CFR 145.51 to conform to 19 U.S.C. 1305, so that, effective January 1, 1993, this section will not prohibit the importation of certain lottery matter printed in Canada for use in connection with a lottery conducted in the United States.

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12291

Because this amendment merely reflects a statutory requirement that confers a benefit upon the public and implements the CFTA, pursuant to 5 U.S.C. 553(a)(1) and (b)(B), notice and public procedure thereon are not required. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this amendment implements a foreign affairs function of the United States, it is not subject to E.O. 12291; therefore, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Regulations and Disclosure Law Branch.

LIST OF SUBJECTS IN 19 CFR PART 145

Customs duties and inspection, Imports, Postal service.

AMENDMENT TO THE REGULATIONS

Accordingly, for the reason stated above, Part 145, Customs Regulations (19 CFR Part 145), is amended as set forth below.

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

Section 145.51 also issued under 19 U.S.C. 1305;

* * * * * * *

2. In § 145.51, paragraph (a)(5) is revised to read as follows:

§ 145.51 Articles prohibited by section 305, Tariff Act of 1930.

(a) * * *

* * * * * * *

(5) Lottery matter, except any lottery ticket, printed paper that may be used as a lottery ticket, or advertisement of any lottery, that is

printed in Canada for use in connection with a lottery conducted in the United States.

* * * * * * *

CAROL HALLETT,
Commissioner of Customs.

Approved: July 24, 1992.
NANCY L. WORTHINGTON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, August 20, 1992 (57 FR 37702)]

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19 CFR Parts 19, 113, and 144

(T.D. 92–81)

RIN–1515–AA22

DUTY-FREE STORES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to designate duty-free stores as a new class of Customs bonded warehouse, to establish procedures for the administration of these facilities, and to incorporate duty-free store operating procedures into the regulations. These changes are necessary to implement § 1908 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100–418).

EFFECTIVE DATE: October 19, 1992.

FOR FURTHER INFORMATION CONTACT: Mike Brengle, Office of Cargo Enforcement and Facilitation, (202–566–8151).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Duty-free stores are Customs bonded warehouses operating under special procedures whereby merchandise is offered for sale to departing travelers without payment of Customs duties and taxes, on condition that the merchandise will be exported by and with them from the United

States. These stores were first established in the late 1950's at airports in the United States and on land borders with Mexico and Canada. At present, there are approximately 125 duty-free stores operating throughout the United States, 43 of which are on the Canadian border, 33 at the Mexican border, and 49 at U.S. international airports.

Duty-free stores have been administered since their inception through U.S. Customs administrative directives, rather than through any specific law or regulation. Customs drafted regulations for the administration of duty-free stores in 1984. However, the draft regulations were never published as a notice of proposed rulemaking, because Congress inserted a provision in Public Law 98–473 (Continuing Appropriations for Fiscal Year 1985) prohibiting the use of Customs funds made available by that Act or any other Act to propose or promulgate any rules or regulations relating to duty-free stores until Congress legislated in the matter. This provision was deemed by Customs to constitute a continuing prohibition in subsequent Customs appropriations until it was specifically terminated. 51 FR 24535.

Congress did not legislate concerning duty-free stores until enactment of § 1908 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100–418; August 23, 1988). Section 1908 amended § 555(b) of the Tariff Act of 1930 (19 U.S.C. 1555(b)) to authorize the establishment and operation of duty-free stores in accordance with the provisions of that law and such regulations as the Secretary of the Treasury may prescribe.

Accordingly, to carry out the provisions of 19 U.S.C. 1555(b) and to regulate seaport duty-free stores which are included within the meaning of "border stores" under § 1555(b)(8)(B), Customs published a notice in the Federal Register (56 FR 22833) on May 17, 1991, soliciting public comment on proposed amendments to the Customs Regulations, which would designate duty-free stores as a new class of Customs bonded warehouse, and establish procedures for the administration and operation of these facilities. By notice published in the Federal Register on July 23, 1991 (56 FR 33733), a number of typographical errors appearing in the original notice were corrected, and the public comment period was extended to August 15, 1991.

Thirteen commenters responded to the notice of proposed rulemaking. A description, together with Customs analysis, of the comments they made is set forth below.

Analysis of Comments

Comment:

Four commenters expressed concern that there was no age requirement for the purchase of duty-free alcoholic beverages. These commenters believed that language should be added to the proposed regulations expressly prohibiting sales to persons under the age of twenty-one, since the potential is there for possible reimportation into the United States.

Response:

Customs already enforces State age requirements regarding alcoholic beverages upon importation into the United States. Customs believes that this is sufficient to prevent minors from reimporting alcoholic beverages that may have been purchased in a duty-free store, which is the essential concern of the commenters. State age requirements do not extend to alcohol sales in the duty-free store itself, which are intended for export only. Customs observes, though, that duty-free store owners seem generally willing to voluntarily adopt age limits in conjunction with localities where that issue is of significant concern.

Comment:

One commenter noted that there were no procedures to protect the duty-free store owner from possible penalties or from being closed down. They asked that language be added to the proposed regulations making Customs subject to the Administrative Procedure Act (APA), as concerns duty-free stores.

Response:

Customs is already subject to the requirements of the APA in this connection. Specifically, § 19.3(e) and (f), Customs Regulations (19 CFR 19.3(e) and (f)), contain procedures to be followed for suspending or terminating operations of a duty-free store. Duty-free store owners are, of course, not immune from assessment of appropriate penalties for violations of the law.

Comment:

A number of commenters stated, with respect to proposed § 19.6(d)(2), that the requirement for withdrawals under blanket permit having to be filed on Customs Form (CF) 7506 or 7505 was time-consuming and paper intensive. Another concern expressed was that the Blanket Permit Summary required that all goods be accounted for by their HTSUS (Harmonized Tariff Schedule of the United States) number. These commenters generally felt that identification in the summary of the product together with its quantity would be adequate for Customs purposes.

Response:

Customs does not believe that any change is necessary. The regulations require that an application for approval for a Blanket Permit to Withdraw be done on a CF 7506 or CF 7505. Sections 19.6(d)(3) and 144.37(h)(2) state that withdrawals under a Blanket Permit to Withdraw shall be made on the sales ticket, and that sales tickets shall serve as the equivalent of the supplementary withdrawal. The CF 7506 or CF 7505 is only required for posting the final disposition of all merchandise covered by the permit. The Summary Blanket Permit is usually overprinted on a copy of the approved Application for Blanket Permit to Withdraw, with no requirement to re-list the HTSUS number.

Comment:

Two commenters suggested that the blanket permit for destruction in proposed § 19.11(h) be changed from $100 per entry to 5 percent of the value of the entry up to a ceiling of $1000.

Response:

Since blanket permits are intended to cover small quantities of merchandise, Customs finds a limit of $100 per entry sufficient.

Comment:

Three commenters stated that proposed § 19.12(a)(2) should be changed to require the filing of documents two days after close of sales ticket reconciliation, provided reconciliation occurs once a week.

Response:

Requiring that permit file folders be kept up to date by filing all pertinent receipts, reports, requests, withdrawals, and blanket permit summaries within two business days after the event occurs is an existing and longstanding policy for bonded warehouses, which Customs believes should not be changed.

Comment:

Three commenters disagreed with proposed § 19.12(a)(3), regarding thefts, shortages and overages, which required that duties be paid within 10 working days after discovery. These commenters advocated a 30-day payment period due to the large number of items that are in inventories, as well as the length of time needed to reconcile and prepare entry documents for any shortages or overages discovered.

Response:

Section 19.12(a)(3) states that the district director may allow the consolidation of duties and taxes applicable to multiple shortages into one payment, which effectively gives the district director the authority to extend this period. Customs thus does not believe that the proposed change is needed.

Comment:

It was also recommended in connection with the proposed revision of § 19.12 that the warehouse proprietor should have a brief period within which to verify minor (nonextraordinary) discrepancies, before having to report them to Customs.

Response:

As currently required under § 19.12(a)(3), nonextraordinary shortages (less than 1% of the value of the merchandise in an entry) do not have to be reported to the district director; however, any detected overage must be immediately brought to the attention of the district director. Customs has concluded that no change to this existing portion of § 19.12(a)(3) is warranted.

Comment:

It was urged, with respect to proposed § 19.35(b), that delivery to an adjacent port of entry be allowed, if it were within 25 statute miles from a subject port.

Response:

Customs does not believe any change is needed. Section 19.35(b) provides for the establishment of a duty-free store within the same port of entry from which a purchaser departs, or within 25 statute miles from the exit point through which the purchaser departs the Customs territory. Therefore, provided the district director approves the delivery procedures, the delivery could be made to an adjacent port of entry.

Comment:

A number of commenters asked, with regard to proposed § 19.36(a), whether commercial sales were allowed when merchandise approached the five-year statutory limit for storage.

Response:

Section 19.36(a) states that withdrawals, other than for delivery to persons for export, may be made provided they are through separate withdrawals, and are approved by the district director.

Comment:

One commenter proposed that a procedure be included in proposed § 19.36(b), whereby Customs would render prompt, nonbinding guidance on changes in the proprietor's warehouse procedures. It was thought that such informal guidance would not require action by the district director, and would not constitute approval of the procedure, but that it would alert the operator to any special Customs concerns, and permit appropriate modifications.

Response:

Customs believes that this would cause an unnecessary duplication of review. Further, although the commenter asserted that changes were required on short notice, it is questionable that changes would be needed without advance planning.

Comment:

It was requested that mitigating guidelines be established in proposed § 19.36(b) for relief from penalties when a change in procedure had been submitted to Customs, and Customs failed to respond within a reasonable period, or when Customs affirmatively accepted the new procedure.

Response:

A duty-free store is required to follow written procedures which will reasonably assure exportation of conditionally duty-free merchandise purchased therein, and liquidated damages under bond may be assessed for failing to do so. The mitigation of such damages would be handled under the general provisions of Part 172, Customs Regulations (19 CFR

Part 172), and determined based on the particular circumstances of each case. Customs does not believe that special mitigation guidelines for duty-free stores in this specific context are necessary or practical.

Comment:

Some commenters voiced opposition to proposed § 19.36(d), insofar as it required that items or types of merchandise that were noted in a "pattern" of reimportation be inconspicuously marked. These commenters recommended that if the failure to assure export in such cases could be traced to one proprietor, only that proprietor should be required to mark the subject merchandise.

Response:

This procedure is not intended to require that all warehouse proprietors mark the "patterned merchandise", but rather to require the store identified as having the problem to mark the subject merchandise. Section 19.36(d) is changed to reflect this.

Comment:

It was also asserted that the marking requirement of proposed § 19.36(e) dealing with duty-paid and domestic merchandise was burdensome and contrary to law.

Response:

Section 1555(b)(3)(D) (19 U.S.C. 1555(b)(3)(D)) generally prohibits a requirement for marking of individual items of merchandise in order "to indicate that the items were sold by a duty-free sales enterprise." Section 19.36(e), however, does not require marking for the purpose of indicating that items are sold by a duty-free store; rather, it requires marking of domestic and duty-paid merchandise. In keeping with the intent of 19 U.S.C. 1555(b)(5), Customs finds that this marking requirement will ensure compliance with recordkeeping responsibilities and permit Customs to audit such compliance.

Comment:

Several commenters believed the requirement in proposed § 19.36(e) that duty-paid and domestic goods cannot be fungible with conditionally duty-free goods in a bonded sales area exceeded Customs statutory authority. These commenters argued that this proposed section would restrict the ability of a duty-free store to sell domestic and duty-paid merchandise, and found no basis for this restriction in the statute.

Response:

Customs is sympathetic to the concerns expressed by these commenters. The law clearly allows duty-free store operators to store duty-paid and domestic merchandise at a duty-free store, even if the merchandise is fungible with conditionally duty-free merchandise. Storage of such merchandise, duty-paid or domestic, at a bonded warehouse facility, other than a duty-free store, is, however, prohibited.

To remedy the concerns expressed, the second sentence of § 19.36(e) is changed by deleting the phrase "and which are not fungible with conditionally duty-free merchandise".

Comment:

One commenter indicated that there was a conflict between proposed §§ 19.36(f) and 19.39(c), in that the former required that duty-free goods be delivered only to purchasers with tickets for departure, and the latter stated that delivery was allowed to scheduled, chartered or "for-hire" airlines. It was understood that some chartered and for-hire airlines do not issue tickets to passengers.

Response:

Customs agrees that a change in language is warranted here, for purposes of clarification. As a result, § 19.36(f) is changed in pertinent part to provide that other proof of impending departure may be used for passengers on chartered or for-hire flights where no tickets are issued.

Comment:

A unique situation was also said to exist, in relation to proposed § 19.36(f), with respect to private nonchartered aircraft, in that no departure documents are presented to Customs. The duty-free enterprise must rely on either affirmative statements by the purchaser, or delivering goods directly to the aircraft and witnessing the take-off. The commenters noting this situation questioned whether this constituted "reasonable assurance" of exportation, as noted in proposed § 19.36(b). If not, they suggested that only purchases over a specified dollar amount of $200 be backed up with proof of export by the proprietor.

Response:

Customs believes no change is necessary here. Although the law does not define what types of aircraft are included, the intent of the law is to ensure that the goods are exported. Therefore, by providing that merchandise may only be sold and delivered to purchasers displaying valid tickets or other proof of impending departure in the case of chartered or for-hire flights where no tickets are issued, § 19.36(f) effectively excludes private aircraft operations.

Comment:

Certain commenters viewed as unduly restrictive the requirement in proposed § 19.37(a) that goods in a crib be limited to a two-week supply, these commenters asserting that an inventory item may not be depleted in the course of two weeks.

Response:

Section 19.37(a) is intended to provide that the quantity of goods in the crib at any given time be limited to an amount estimated to be a two-week supply. The district director, upon request, may, of course, permit a lesser or greater quantity. To clarify this matter, § 19.37(a) is changed accordingly.

Comment:

Another area of concern voiced with respect to crib operations was the requirement that storage in the crib be by entry number instead of by brand.

Response:

Section 19.37(b) provides that conditionally duty-free merchandise shall be delivered to or removed from a crib for return to the storage area under the provisions of § 144.34(a), Customs Regulations (19 CFR 144.34(a)), or under a local control system approved by the district director. A system may be approved by the district director in his discretion, which does not require storage by entry number.

Comment:

One commenter requested that proposed § 19.37(d) be changed to allow proprietors to maintain records at a central administrative office as part of an automated tracking system, instead of at the duty-free store.

Response:

Customs agrees that maintaining records for a five-year period at the duty-free store could become cumbersome. To remedy this, § 19.36(g) is changed to allow for record retention at the duty-free store or at another location approved by the district director, provided that the proprietor assures that Customs has ready access to those records and that they are stored in such a manner as to keep transactions of multiple facilities separated. Sections 19.37(d) and 19.39(d) are appropriately amended to conform with this.

Comment:

One commenter recommended, with respect to proposed § 19.38, that spot checks be avoided during peak sales periods; that the proprietor be afforded the opportunity to resolve discrepancies before a spot check is conducted; that demands for stock status reports be made in advance so that activity could be frozen before counts were conducted; and that audits take into account the retail nature of duty-free operations.

Response:

Customs officers are responsible for conducting unannounced spot checks of storage areas, cribs, and other secure areas where duty-free store merchandise is deposited, and of selected duty-free store transactions. Customs tries to make such spot checks as nondisruptive as possible. Unlike audits, for which advance notice is provided, unannounced spot checks are needed for enforcement. Amending this provision along the lines recommended would thus be contrary to this purpose.

Comment:

One commenter asked that the language in proposed § 19.39(a) be changed to be consistent with that in proposed § 19.35(d), which referred to the "exit point".

Response:

Customs believes it is unnecessary to repeat the definition of an "exit point" in § 19.39(a). However, a cross reference to § 19.35(d) in this regard is added to § 19.39(a) for the sake of clarity.

Comment:

A number of commenters opposed the reference to "an authorized representative of the supervising independent party", appearing in proposed § 19.39(a)(2) and (b)(2), stating that Customs had no authority to delegate supervision of delivery of merchandise for export to a private, third party.

Response:

Customs concurs that this wording is incorrect and it is deleted from § 19.39(a)(2) and (b)(2).

Comment:

It was suggested that proposed § 19.39(b)(1) be changed to read that "for purposes of this section, beyond the exit point includes the actual gangway of a ship, in the sole discretion of the district director."

Response:

Customs is unable to adopt this suggestion. The gangway of a ship is not a Customs-secured area. However, for additional clarity, a cross reference to § 19.35(d) defining an "exit point" is added to § 19.39(b)(1).

Comment:

One commenter suggested that the language appearing in proposed § 19.39(c)(2) regarding the delivery of export merchandise to the passenger might properly belong in proposed § 19.39(c)(3) which concerned delivery to the aircraft. Specifically in this connection, two commenters viewed the requirements for certificates of lading in proposed § 19.39(c)(2) as impractical, overly detailed and time-consuming.

Response:

Although § 19.39(c)(2) deals with delivery to the passenger, rather than the aircraft, Customs finds that the requirement for a certificate of lading executed by an authorized airline official is essential to reasonably ensure that the passenger has taken the merchandise aboard the aircraft for export.

Comment:

Four commenters recommended that Customs include a specific definition for "reasonable assurance of export", as the concept is employed in proposed § 19.39(c)(2). It was urged that the definition exclude any failure to export that resulted from the purchaser's negligence, misstatements or fraud, provided that the proprietor had followed proper procedures.

Response:

Customs does not believe that it is necessary to specifically define this term because § 19.39(c)(2) in effect allows a duty-free store operator and

the district director to work out, on a case-by-case basis, the particular location where the merchandise may be turned over to the passenger, so as to reasonably assure export in a given circumstance.

Comment:

Various commenters requested that the language in proposed § 19.39(c)(3) which provides for aircraft delivery by a licensed cartman for lading "directly on the aircraft", be changed to "within the aircraft on which the purchaser will depart for carriage as passenger baggage", as stated in 19 U.S.C. 1555(b)(3)(F)(i)(III).

Response:

Section 19.39(c)(3) is one of five procedures established for the method of delivery to airport locations. The intent of these provisions is to ensure that merchandise from duty-free stores is exported, and Customs has concluded that the provision in question adequately accomplishes this goal, and that it is within the definition of the statute. Specifically in this connection, Customs interprets the phrase "on the aircraft" to mean the same as "within the aircraft".

Comment:

These commenters also regarded as practically impossible the requirement in proposed § 19.39(c)(3) that a lading manifest be prepared, which would include entry numbers or unique identifiers, in some cases hundreds of them. They suggested that only the sales receipt number be required.

Response:

Section 19.39(c)(3) deals with merchandise sold to passengers, which is delivered by a licensed cartman for lading directly on the aircraft, where the aircraft is departing directly for foreign. Customs concludes that a lading manifest would not be necessary in such circumstances, inasmuch as the merchandise is not placed in containers sealed with Customs seals. Therefore, § 19.39(c)(3) is changed by removing the requirement for a lading manifest.

Comment:

Two commenters advocated use of the motor vehicle license plate, instead of the purchaser's name and address, in proposed § 144.37(h)(2)(v), so that the purchaser could be more readily identified by U.S. or Canadian Customs, in the event a problem were to arise.

Response:

Customs believes that the use of the license plate, instead of the name and address of the purchaser appearing on the sales receipt, would not be a more efficient means of identifying purchasers of duty-free store merchandise. The license plate would identify the vehicle, not necessarily the purchaser.

Comment:

One commenter requested, with respect to proposed § 144.37(h)(2), that the total number of items of the same type be listed together, rather than be listed separately. This commenter was of the understanding that, of two bottles of bourbon, for example, each would have to be listed separately.

Response:

Section 144.37(h)(2)(iii) calls for reporting the aggregate quantity of goods of a particular type which are sold, and does not require the same type item to be listed separately.

Comment:

Several commenters wanted relief from the perceived requirement in proposed § 144.37(h)(3) for separating each individual item from the sales ticket register and filing it separately against the withdrawal and entry. They expressly asked in this regard for permit filing in any manner determined by the proprietor, as long as the underlying documents could be produced for Customs on request.

Response:

Section 144.37(h)(3)(v) does not require separate listing of the same item; it only requires that the total quantity of a given item sold be reported. These commenters appear to be under the impression that there is a separate register for each item rather than a sales register for each entry covering merchandise entering the duty-free store. The sales ticket register or similar accounting record is an inventory control for monitoring balances.

Comment:

A recommendation was made, in relation to proposed § 144.37(h)(3), to save the sales ticket register for five years, and not the sales tickets. An alternative suggestion was to retain the sales tickets and file them by date and invoice number sequence. To this latter end, it was thought that filing the sales tickets by warehouse entry number would be very difficult and time-consuming, especially in the case of multiple sales, which would mean copying each sales ticket numerous times.

Response:

Section 144.37(h)(3) calls for a "sales ticket register or similar accounting record", provided the required information is shown on the document. The proprietor is given the leeway to keep all sales tickets in a separate file in lieu of placing a copy of the sales tickets in each permit file folder, which, additionally, is the purpose of maintaining a sales register for each entry.

CONCLUSION

After careful consideration of the comments received and further review of the matter, it has been determined that the amendments with the modifications discussed above should be adopted. In addition, the

following editorial changes are made: changing the heading for § 19.39 to "Delivery for exportation"; changing the second sentence of § 19.35(d) to read in part, "by passing through a U.S. Customs inspection facility"; adding "with no intermediate stops in the U.S.", at the end of § 19.36(f); deleting § 19.39(c)(6); changing the second sentence of § 19.39(a)(2), (b)(2), and (c)(2), respectively, to read in part, "in accordance with established guidelines as required by § 19.36(b)"; adding in § 19.39(c)(4)(i), after "stopover privileges", the words "in the United States"; and deleting the last two sentences of § 19.39(f) as repetitious of the requirements in § 19.36(b); rephrasing § 113.63(c)(5) to make it parallel with § 113.63(c)(1–4).

Regulatory Flexibility Act

For the reasons set forth in the preamble, and pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Paperwork Reduction Act

The collection of information contained in this final regulation has been approved by the Office of Management and Budget (OMB) under 1515–0121, Establishment of Bonded Warehouses. Duty-free stores have long existed as a type of Customs bonded warehouse under established administrative practice. This final regulation will specifically include duty-free stores in the Customs Regulations as a separate class of bonded warehouse, and does not change the information collection burden with respect thereto.

The collection of information in this final regulation is in §§ 19.2, 19.6, 19.11, 19.12, 19.36, 19.37, 19.38, 19.39 and 144.37. This information is necessary to assure the exportation of merchandise from duty-free stores, and to otherwise implement the requirements of law and protect the revenue. Comments concerning the accuracy of the existing burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503, with copies to the U.S. Customs Service at the address previously specified.

Drafting Information

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

Part 19

Customs duties and inspection, Imports, Exports, Warehouses.

Part 113

Customs bonds.

Part 144

Customs duties and inspection, Imports, Warehouses.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, Parts 19, 113, and 144, Customs Regulations (19 CFR Parts 19, 113, and 144), are amended as set forth below.

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The authority citation for Part 19 is revised to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624;

§ 19.1 also issued under 19 U.S.C. 1311, 1312, 1555, 1556, 1557, 1560, 1561, 1562;

§ 19.6 also issued under 19 U.S.C. 1555;

§ 19.7 also issued under 19 U.S.C. 1555, 1556;

§ 19.11 also issued under 19 U.S.C. 1556, 1562;

§ 19.15 also issued under 19 U.S.C. 1311;

§§ 19.17–19.25 also issued under 19 U.S.C. 1312;

§§ 19.35–19.39 also issued under 19 U.S.C. 1555;

§ 19.40(a) also issued under 19 U.S.C. 1450, 1499, 1623;

§§ 19.41–19.43 also issued under 19 U.S.C. 1499;

§ 19.44 also issued under 19 U.S.C. 1448;

§ 19.45 also issued under 19 U.S.C. 1551, 1565;

§ 19.48 also issued under 19 U.S.C. 1499, 1623;

§ 19.49 also issued under 19 U.S.C. 1484.

2. Section 19.1 is amended by adding a new paragraph (a)(9) to read as follows:

§ 19.1 Classes of customs warehouses.

(a) * * *

(9) *Class 9.* Bonded warehouse, known as "duty-free stores", used for selling, for use outside the Customs territory, conditionally duty-free merchandise owned or sold by the proprietor and delivered from the Class 9 warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the Customs territory for destinations other than foreign trade zones. Pursuant to 19 U.S.C. 1555(b)(8)(C), "Customs territory", for purposes of duty-free stores, means the Customs territory of the U.S. as defined in § 101.1(e) of this chapter, and foreign trade zones (see Part 146 of this chapter).

* * * * * * *

3. Section 19.2 is amended by removing the paragraph designations for paragraphs (b)(1), (2), and (3); by adding a phrase at the end of the introductory text of paragraph (b) and adding new paragraphs (1), (2), (3), and (4); by revising paragraph (c), and by removing and reserving paragraph (d), as follows:

§ 19.2 Applications to bond; annual fee.

* * * * * * *

(b) * * * If the application is for a Class 9 warehouse (duty-free store), the applicant shall furnish the following documents:

(1) A map showing the location of the facilities to be bonded in respect to the port of entry and distances to all exit points of purchasers of conditionally duty-free merchandise;

(2) A description of the store's procedures to provide reasonable assurance that conditionally duty-free merchandise sold therein will be exported;

(3) If an airport duty-free store, a description of the store's procedures for restricting sales of conditionally duty-free merchandise to personal-use quantities; and

(4) A statement by an authorized official of the appropriate state, local, or other governmental authority administering the exit point facility that the applicant duty-free store is authorized to deliver conditionally duty-free merchandise to purchasers at or through that exit point facility. A separate statement shall be required for each governments authority having jurisdiction over exit point facilities through which the duty-free store intends to deliver merchandise to purchasers. If the merchandise will be delivered through an exit point which is not under the jurisdiction of a governmental authority, the applicant will provide a statement to that effect.

(c) On approval of the application to bond a warehouse of any class, except class 1, a bond shall be executed on Customs Form 301, containing the bond conditions set forth in § 113.63 of this chapter.

(d) [Reserved].

* * * * * * *

4. Section 19.3 is amended by adding a new paragraph (e)(9) as follows:

§ 19.3 Bonded warehouse; alterations; relocations; suspensions; discontinuance.

* * * * * * *

(e) * * *

(9) The proprietor of a Class 9 warehouse is or has been unable to provide reasonable assurance that conditionally duty-free merchandise is or was exported in compliance with the regulations of this part.

* * * * * * *

5. Section 19.5 is deleted and reserved.

6. Section 19.6 is amended by revising the section heading and paragraph (d) to read as follows:

§ 19.6 Deposits, withdrawals, blanket permits to withdraw and sealing requirements.

* * * * * * *

(d) *Blanket permits to withdraw.* (1) *General.* Blanket permits may be used to withdraw merchandise in small quantities from bonded warehouses for:

(i) delivery to individuals departing directly from the Customs territory for exportation under the sales ticket procedure of § 144.37(h) of this chapter (Class 9 warehouses only);

(ii) aircraft or vessel supplies under § 309 or 317, Tariff Act of 1930, as amended (19 U.S.C. 1309, 1317); or

(iii) the personal or official use of personnel of foreign governments and international organizations set forth in subpart I, part 148 of this chapter; or

(iv) a combination of the foregoing. Blanket permits to withdraw may be used only for delivery at the port where withdrawn and not for transportation in bond to another port. Blanket permits to withdraw may not be used for delivery to a location for retention or splitting of shipments under the provisions of § 18.24 of this chapter. A withdrawer who desires a blanket permit shall state in capital letters on the warehouse entry, or on the warehouse entry/entry summary when used as an entry, that "Some or all of the merchandise will be withdrawn under blanket permit per section 19.6(d), C.R." Customs acceptance of the entry will constitute approval of the blanket permit. A copy of the entry will be delivered to the proprietor, whereupon merchandise may be withdrawn under the terms of the blanket permit. The permit may be revoked by the district director in favor of individual applications and permits if the permit is found to be used for other purposes, or if necessary to protect the revenue or properly enforce any law or regulation Customs is charged with administering. Merchandise covered by an entry for which a blanket permit was issued may be withdrawn for purposes other than those specified in this paragraph if a withdrawal is properly filed as required in subpart D, part 144, of this chapter.

(2) *Withdrawals under blanket permit.* Withdrawals may be made under blanket permit without any further Customs approval, and shall be documented by placing a copy of the withdrawal document in the proprietor's permit file folder. Each withdrawal shall be filed on Customs Form 7506 or 7505, as appropriate, and shall be consecutively numbered, prefixed with the letter "B". The withdrawal shall specify the quantity and value of each type of merchandise to be withdrawn. Each copy shall bear the summary statement described in § 144.32(a) of this chapter, reflecting the balance of merchandise covered by the warehouse entry. Any joint discrepancy report of the proprietor and the

bonded carrier, licensed cartman or lighterman, or weigher, gauger, or measurer for a supplementary withdrawal shall be made on the copy and reported to the district director as provided in paragraph (b)(1) of this section. A copy of the withdrawal shall be retained in the records of the proprietor as provided in § 19.12(a)(2) of this part. Merchandise shall not be removed from the warehouse prior to the preparation of the supplementary withdrawal. If merchandise is so removed, the proprietor shall be subject to liquidated damages as if it were removed without Customs permit.

(3) *Withdrawals under blanket permit from duty-free stores.* Withdrawals under blanket permit from duty-free stores shall be made on the sales ticket described in § 144.37(h) of this chapter. The sales ticket need not contain the summary statement described in § 144.32(a) of this chapter, since the information required is included in the sales ticket register. The sales ticket shall be serially numbered as provided in § 144.37(h)(2) of this chapter.

(4) *Blanket permit summary.* When all of the merchandise covered by an entry on which a blanket permit to withdraw was issued has been withdrawn, including withdrawals made for purposes other than duty-free store delivery, vessel or aircraft supply, or diplomatic use, the proprietor shall prepare a report on a copy of Customs Form 7506, or a form on the letterhead of the proprietor, which provides an account of the disposition of the merchandise covered by the blanket permit. The form shall bear the words "BLANKET PERMIT SUMMARY" in capital letters conspicuously printed or stamped in the top margin. On the form, the proprietor shall certify that the merchandise listed thereunder was withdrawn in compliance with § 19.6(d), and shall account for all of the merchandise withdrawn under blanket permit by HTSUS (Harmonized Tariff Schedule of the United States) number, HTSUS quantity (where applicable) and value. If applicable, the account shall separately list and identify merchandise withdrawn for

(i) Duty-free store exportation,

(ii) Vessel or aircraft supply use, and

(iii) Personal or official use of persons and organizations set forth in subpart I, part 148, of this chapter. If all of the merchandise was withdrawn under the sales ticket procedure of § 144.37(h) of this chapter, the sales ticket register may be substituted for the blanket permit summary. The form will be placed in the permit file folder and treated as provided in § 19.12(a) of this part.

* * * * * * *

7. Section 19.11 is amended by revising the first sentence of paragraph (c), removing the fourth sentence of paragraph (d), and revising paragraph (d), and by adding a new paragraph (h), to read as follows:

§ 19.11 Manipulation in bonded warehouses and elsewhere.

* * * * * * *

(c) Warehouse proprietors shall not allow manipulation of any merchandise without a prior permit issued by the district director, except as provided in paragraph (h) of this section. * * *

(d) The application to manipulate, which shall be filed on Customs Form 3499 with the district director having jurisdiction of the warehouse or other designated place of manipulation, shall describe the contemplated manipulation in sufficient detail to enable the district director to determine whether the imported merchandise is to be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, within the meaning of § 562, Tariff Act of 1930, as amended. If the district director is satisfied that the merchandise is to be so manipulated, he may issue a permit on Customs Form 3499, making any necessary modification in such form. The district director may approve a blanket application to manipulate on Customs Form 3499, for a period of up to one year, for a continuous or a repetitive manipulation. The warehouse proprietor must maintain a running record of manipulations performed under a blanket application, indicating the quantities before and after each manipulation. The record must show what took place at each manipulation describing marks and numbers of packages, location within the facility, quantities, and description of goods before and after manipulation. The district director is authorized to revoke a blanket approval to manipulate and require the proprietor to file individual applications if necessary to protect the revenue, administer any law or regulation, or both. Manipulation resulting in a change in condition of the merchandise, which will make it subject to a lower rate of duty or free of duty upon withdrawal for consumption, is not precluded by the provisions of such § 562.

* * * * * * *

(h) Merchandise which has been entered for warehouse and placed in a Class 9 warehouse (duty-free store) may be unpacked into saleable units without a prior permit issued by the district director. The district director may issue a blanket permit to a duty-free store for up to one year permitting the destruction of merchandise covered by any entry and found upon receipt to be nonsaleable, if the merchandise to be destroyed is valued at less than $100 per entry, in its undamaged condition. Such permit may be revoked in favor of a permit for each entry whenever necessary to assure proper destruction and protection of the revenue. The proprietor shall maintain a record of unpacking merchandise into saleable units and destruction of nonsaleable merchandise in its inventory and accounting records.

8. Section 19.12 is amended by revising paragraph (a)(2), adding two sentences to the end of paragraph (a)(3), by revising paragraph (a)(4), and by adding a new paragraph (a)(8), to read as follows:

§ 19.12 Warehouse recordkeeping, storage and security requirements.

(a) * * *

(2) *Maintain permit file folders.* Permit file folders shall be maintained and kept up to date by filing all receipts, damage or shortage reports, manipulation requests, withdrawals, removals, and blanket permit summaries within two business days after the event occurs.

(3) *Theft, shortage, overage or damage.* * * * The applicable duties and taxes on thefts and shortages so reported shall be paid by the responsible party to Customs within 10 working days after discovery. The district director may allow the consolidation of duties and taxes applicable to multiple shortages into one payment.

(4) *Review of permit file folder.* When the final withdrawal of merchandise relating to a specific warehouse entry, general order or seizure occurs, the warehouse proprietor shall:

(i) Review the permit file folder to ensure that all necessary documentation is in the file folder accounting for the merchandise covered by the entry,

(ii) Notify Customs of any merchandise covered by the warehouse entry, general order or seizure which has not been withdrawn or removed, and

(iii) File the permit file folder with Customs within 30 business days after final withdrawal.

* * * * * * *

(8) *Automated operating and inventory control systems.* The district director may authorize the implementation by a proprietor of automated data processing systems for operating and inventory control purposes if they are in support of Customs procedural requirements and do not adversely affect Customs supervision and control of warehouse activities and transactions.

* * * * * * *

9. Part 19, Customs Regulations, is amended by adding after § 19.34, a new center heading entitled "Duty-Free Stores", and new §§ 19.35, 19.36, 19.37, 19.38, and 19.39, to read as follows:

DUTY-FREE STORES

Sec.

DUTY-FREE STORES

§ 19.35 Establishment of duty-free stores (Class 9 warehouses).

(a) *General.* A Class 9 warehouse (duty-free store) may be established for exportation of conditionally duty-free merchandise by individuals departing the Customs territory, inclusive of foreign trade zones, by aircraft, vessel, or departing directly by vehicle or on foot to a contiguous country. Such articles must accompany the individual on his person or

in the same aircraft, vessel, or vehicle in which the individual departs. "Conditionally duty-free merchandise" means merchandise sold by a duty-free store on which duties and/or internal revenue taxes (where applicable) have not been paid. Except insofar as the provisions of this section and §§ 19.36–19.39 are more specific, the procedures for bonded warehouses apply to duty-free stores (Class 9 warehouses).

(b) *Location.* A Class 9 warehouse may be established or located only (1) within the same port of entry from which a purchaser of duty-free store merchandise departs the Customs territory, or (2) within 25 statute miles from the exit point through which the purchaser of duty-free store merchandise departs the Customs territory.

(c) *Integrated locations.* A Class 9 warehouse with multiple noncontiguous sales and crib locations (see § 19.37(a) of this part) containing conditionally duty-free merchandise will be treated by Customs as one location if (1) the proprietor can provide Customs upon demand with the proper on-hand balance of each inventory item in each storage location, sales room, crib, mobile crib, delivery cart, or other conveyance or noncontiguous location, and (2) the recordkeeping system is centralized up to the point where a sale is made so as to automatically reduce the sale quantity by location from the centralized inventory.

(d) *Exit point.* The exit point referred to in paragraph (b) of this section means an area in close proximity to an actual exit for departing from the Customs territory, including the gate holding area in the case of an airport, but only if there is reasonable assurance that conditionally duty-free merchandise delivered in the gate holding area will be exported from the Customs territory. The exit point in the case of a land border or seaport duty-free store is the point at which a departing individual has no practical alternative to continuing on to a foreign country or to returning to Customs territory by passing through a U.S. Customs inspection facility. The district director's decision as to what constitutes the exit point or reasonable assurance of exportation in a given situation is final.

(e) *Notice to customers.* Class 9 warehouse proprietors shall display in prominent places where they will be noticed and read by customers signs which state clearly that any conditionally duty-free merchandise purchased from the store:

(1) Has not been subjected to any U.S. Federal duty or tax;

(2) If brought back to the United States must be declared and is subject to U.S. Federal duty and tax without personal exemption; and

(3) Is subject to the customs laws and regulations, including possible duties and taxes, of any foreign country to which it is taken.

(f) *Security of sales rooms and cribs.* The physical and procedural security requirements of § 19.12(b)(3) of this part shall be applied by the district director so as to accommodate the movement of purchasers and prospective purchasers of conditionally duty-free merchandise contained in duty-free sales rooms and cribs.

(g) *Approval of governmental authority.* If a state or local or other governmental authority, incident to its jurisdiction over any airport, seaport, or other exit point facility, requires that a concession or other form of approval be obtained from that authority with respect to the operation of a duty-free store under which merchandise is delivered to or through such facility for exportation, merchandise incident to such operation may not be withdrawn for exportation and transferred to or through such facility unless the operator of the duty-free store demonstrates to the district director that the concession or approval required for the enterprise has been obtained.

§ 19.36 Requirements for duty-free store operations.

(a) *Withdrawals.* Merchandise withdrawn under the sales ticket procedure in § 144.37(h) of this chapter may be delivered only to individuals departing from the Customs territory for exportation or to persons and organizations for use as specified in subpart I, part 148, of this chapter. Withdrawals of other kinds may be made from Class 9 warehouses, but only through separate withdrawals (or withdrawals under blanket permit for vessel or aircraft supplies) under an approved permit of the district director as provided in § 144.39 of this chapter.

(b) *Procedures required.* Each duty-free store shall establish, maintain, and follow written procedures to provide reasonable assurance to the district director that conditionally duty-free merchandise purchased therein will be exported from the Customs territory. A copy of any change in the procedure will be provided to the district director before it is implemented. However, receipt by Customs of the procedures or any change thereto shall not be construed as approval by Customs of the procedures. The district director is responsible for ensuring that each enterprise has established guidelines with Customs and is complying with those guidelines, giving assurance that proper supervision exists when delivery is made to the purchaser at or before the exit point. The district director may at any time require any change in the procedures deemed necessary for assurance of exportation.

(c) *Personal-use restrictions.* Any duty-free store which delivers conditionally duty-free merchandise to purchasers at an airport exit point shall establish, maintain, and enforce written restrictions on the sale of conditionally duty-free merchandise to any one individual to personal-use quantities. Personal-use quantities means quantities that are only suitable for uses other than resale, and includes reasonable quantities for household or family consumption as well as for gifts to others. Proprietors will not knowingly sell or deliver conditionally duty-free merchandise in any quantity to any individual for the purpose of resale. A copy of the restrictions and of any change thereto shall be provided to the district director prior to implementation. However, receipt of the written restrictions by Customs shall not be construed as approval by Customs of the restrictions. The district director may require any change in the restrictions deemed necessary to conform to the personal-use quantity restriction of this section.

(d) *Reimported merchandise.* Merchandise purchased in a duty-free store is not eligible for exemption from duty, or tax where applicable, under chapter 98, subchapter IV, Harmonized Tariff Schedule, if it is brought back to the United States after exportation. To enforce this restriction, the district director may require the proprietor to mark or otherwise place a distinguishing identifier on individual items of merchandise to indicate the items were sold in a U.S. duty-free store, if a pattern is disclosed in which such items are being brought back to the United States without declaration. A pattern of undeclared reimportations means a number of instances over a period of time and not isolated instances of unrelated violations. Any such marking required by the district director will be inconspicuous to the purchaser and will not detract from the value of the merchandise. The marking requirement will be limited to the items or types of merchandise noted in the pattern, and will not be extended to all merchandise of the responsible store proprietor unless all or most items are part of the pattern.

(e) *Merchandise eligible for warehousing.* Only conditionally duty-free merchandise may be placed in a bonded storage area of a Class 9 warehouse. However, domestic merchandise and merchandise which was previously entered or withdrawn for consumption, may be brought into the bonded sales or crib area of a Class 9 warehouse for display and sale, and in the case of a crib, for delivery to purchasers. However, such merchandise must be marked "DUTY-PAID" or "U.S. ORIGIN", or with similar markings, as applicable, for easy distinction by Customs officers and purchasers of conditionally duty-free merchandise from other merchandise in the sales or crib area.

(f) *Sale of merchandise.* Conditionally duty-free merchandise for exportation at airport or seaport exit points may be sold and delivered only to purchasers who display valid tickets, or in the case of chartered or for-hire flights that have not issued tickets, other proof of impending departure from the Customs territory, and to crewmembers who have been engaged for a flight or voyage departing directly from the Customs territory with no intermediate stops in the U.S.

(g) *Inventory procedure.* Duty-free store proprietors shall maintain, at the duty-free store or at another location approved by the district director, a current inventory separately for each storage area, crib, and sales area containing conditionally duty-free merchandise by warehouse entry, or by unique identifier where permitted by the district director. Proprietors shall assure that Customs has ready access to those records, and that the records are stored in such a way as to keep transactions of multiple facilities separated. The inventory shall be reconcilable with the accounting and inventory records and the permit file folder requirements of § 19.12(a)(1) and (2), of this part. Proprietors are subject also to the recordkeeping requirements of other paragraphs of § 19.12, as well as those of §§ 19.6(d), 19.37(d), 19.39(d) of this part, and 144.37(h)(3) of this chapter.

§ 19.37 Crib operations.

(a) *Crib.* A "crib" means a bonded area, separate from the storage area of a Class 9 warehouse, for the retention of a small supply of articles for delivery to persons departing from the United States. It shall be located beyond the exit point, unless exception has been made under § 19.39(a) and (b) of this part. The crib may be a permanent location or a mobile facility which is periodically moved to a location beyond the exit point. The quantity of goods in the crib shall be limited to an amount estimated to be a two weeks' supply. However, the district director may, upon request, permit a lesser or greater quantity as he deems necessary for the protection of the revenue and proper administration of U.S. laws and regulations, or he may order the return to the storage area of goods remaining unsold.

(b) *Delivery and removal of merchandise.* Conditionally duty-free merchandise shall be delivered to the crib, or removed from the crib for return to the storage area, under the procedures in subpart D, part 125, and § 144.34(a), of this chapter, or under a local control system approved by the district director wherein any discrepancy found in the merchandise will be treated as if it occurred in the bonded warehouse. If delivery is made by licensed cartman, cartage vehicles shall be conspicuously marked as provided in § 112.27 of this chapter.

(c) *Delivery vehicles.* Vehicles, including mobile cribs, containing conditionally duty-free merchandise for delivery to or from a crib shall carry a listing of the articles contained therein. The proprietor shall provide, upon request by Customs, a transfer document sufficient to account for each movement of inventory among its locations. The merchandise in the vehicles shall be subject to inspection by Customs.

(d) *Retention of records.* Class 9 warehouse proprietors shall maintain records of conditionally duty-free merchandise transported beyond the exit point and returned therefrom, and Customs permits for such movements, for not less than 5 years after exportation of the articles. Such records need not be placed in permit file folders but must be filed by date of movement, destination site and warehouse entry number or by unique identifier where permitted by the district director (see § 19.36(g)).

§ 19.38 Supervision of exportation.

(a) *Sales ticket withdrawals.* Conditionally duty-free merchandise withdrawn under the sales ticket procedure for exportation shall be exported only under Customs supervision as provided in this section and § 19.39 of this part. General Customs supervision shall be exercised as provided in §§ 19.4 of this part and 161.1 of this chapter, and may consist of spot checks of exportation transactions, examination of articles being exported, and audits of the proprietor's records.

(b) *Supervision of ATF bonded exports.* Customs officers may conduct general supervision of exportations of cigarettes and cigars from ATF export bonded warehouses (see 27 CFR part 290) in conjunction with exportation from duty-free stores.

§ 19.39 Delivery for exportation.

(a) *Delivery to land border locations.* (1) *Land border locations.* "Land border location" means an exit point (see § 19.35(d)) from which individuals depart to a contiguous country by vehicle or on foot by bridge, tunnel, highway, walkway, or by ferry across a boundary lake or river, but not including departure to a contiguous country by air or sea. Deliveries from a duty-free store for exportation from such locations shall be made to the purchaser only beyond the exit point, except as specified in paragraph (a)(2) of this section.

(2) *Delivery at or before exit point.* Delivery of such merchandise may be made at or before the exit point of any location approved by Customs as of August 23, 1988. In such cases, delivery shall be done under the physical supervision of a Customs officer, or in accordance with established guidelines as required by § 19.36(b) of this part. The officer shall sign the sales ticket certifying exportation and return it to the proprietor for retention in the files. The district director may also require that the warehouse proprietor have the person receiving the article sign the same copy to certify receipt.

(b) *Delivery to seaport locations.* (1) *Seaport location.* "Seaport location" means an exit point (see § 19.35(d)) from which conditionally duty-free merchandise is delivered to departing individuals for exportation by vessel of more than 5 net tons which is departing directly from the Customs territory to touch and trade in a foreign country. Deliveries for exportation from such locations may be made only beyond the exit point, except as specified in paragraph (b)(2) of this section.

(2) *Delivery at or before exit point.* Delivery of such merchandise may be made at or before the exit point in the case of any locations approved by Customs as of August 23, 1988. In such cases, delivery shall be done under the physical supervision of a Customs officer, or in accordance with established guidelines as required by § 19.36(b) of this part. The officer shall sign the sales ticket certifying exportation and return it to the proprietor for retention in the files. The district director may also require that the warehouse proprietor have the person receiving the article sign the same copy to certify receipt.

(c) *Delivery to airport locations.* "Airport location" means an exit point from which conditionally duty-free merchandise is delivered to departing individuals for exportation on a scheduled, chartered, or "for-hire" airline. Delivery of conditionally duty-free merchandise to be exported from such locations may be made by one of the following five procedures:

(1) *Delivery in sterile area.* A sterile area is an area that is within the airport and to which access is restricted to those passengers departing from Customs territory. In such cases, delivery will be made directly to the purchaser (or a family member or companion travelling with the purchaser) for carrying aboard the aircraft. This method of delivery is not authorized if there is any mixture in the sterile area of individuals

arriving from a foreign country, or individuals arriving or departing on a domestic flight, with individuals departing for foreign;

(2) *Passenger delivery*. Merchandise may be delivered by the cartman or duty-free store operator to the purchaser (or a family member or companion travelling with the purchaser) at or beyond the exit point for the flight. The district director may require the exit point to be delimited by marking of its boundaries, or require proper supervision in accordance with established guidelines as required by § 19.36(b) of this part, if needed for reasonable assurance that conditionally duty-free merchandise will be exported with the purchaser or a family member or companion. A certificate of lading shall be prepared by the proprietor for each shipment of conditionally duty-free merchandise and executed by an authorized airline official, certifying that the merchandise has been laden on a particular aircraft for exportation. After execution, the certificate will be returned to the duty-free store proprietor for filing. The certificate shall include the following information: Warehouse entry number (or unique identifier, if permitted by the district director); aircraft departure date; airline flight number; and total quantity delivered to the flight;

(3) *Aircraft delivery*. The merchandise will be delivered by a licensed cartman for lading directly on the aircraft. The airline will release the merchandise to the purchaser when the aircraft has departed for its foreign destination;

(4) *Unit-load delivery*. Merchandise may be sold to passengers departing from the United States at a prior port of boarding on flights proceeding to a foreign destination which are required to clear with intermediate stops in the United States, provided that all of the following conditions are met:

(i) Sales may be made only to passengers holding a through ticket on the same flight, with no stopover privileges in the United States, to a foreign destination;

(ii) Merchandise shall be placed in a container sealed with Customs seals. The sealed container(s) may be placed in the baggage compartment or on the passenger deck of the aircraft. Containers stowed in baggage compartments may, with Customs permission, be transferred to the passenger deck at an intermediate or final stop in the United States. The seal numbers shall be placed on the face of the aircraft general declaration;

(iii) A lading manifest list, in duplicate, of conditionally duty-free merchandise sold to passengers aboard the particular flight will be prepared by the proprietor. An authorized airline representative will sign for receipt, with one copy to be retained by the airline for presentation to Customs as requested at the intermediate or final port, and the duplicate copy to be returned to and retained by the proprietor for record purposes;

(iv) The seals shall not be broken nor shall any of the purchases be delivered until the aircraft is secured for departure to its foreign destina-

tion at the last port. In the event that the seals are broken before that time, or the merchandise is not exported for any reason and not returned to Customs custody, demand shall be made against the importation and entry bond of the importer of record;

(5) *Cancelled or aborted flights or "no show" purchasers.* If the proprietor has made a good faith effort to effect delivery for exportation through one of the methods specified in paragraph (c)(1) through (4) of this section, but is unable to do so for reasons beyond the proprietor's control, the proprietor may deliver the conditionally duty-free merchandise by any other method deemed reasonable by the district director. Written procedures for delivery for exportation, specifying responsibilities for any discrepancies which might occur, shall be established by the proprietor and provided to the district director. The district director may require any change in procedure deemed necessary to assure exportation under specific circumstances.

(d) *Lading manifest lists; certificate of exportation.* The proprietor shall retain copies of lading manifest lists and certificates of lading for exportation in its files for not less than 5 years after exportation by warehouse entry number or by unique identifier where permitted by the district director (see § 19.36(g)).

(e) *Delivery method.* Delivery of conditionally duty-free merchandise to persons for exportation will be made by licensed cartmen under the procedures in subpart D, part 125, and § 144.34(a), of this chapter, or under a local control system approved by the district director wherein any discrepancy found in the merchandise will be treated as if it occurred in the bonded warehouse.

(f) *Return of merchandise to stock.* Whenever merchandise is withdrawn under the sales ticket procedure of § 144.37(h) of this chapter, but is undeliverable or is rejected by the purchaser, the merchandise may be returned to the duty-free store and the records, including the sales ticket and sales ticket register, amended to reflect the quantity returned to stock.

PART 113 – CUSTOMS BONDS

1. The authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624. Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

2. Section 113.63 is amended by adding a new paragraph (c)(5) thereto as follows:

§ 113.63 Basic custodial bond conditions.

* * * * * * *

(c) *Disposition of merchandise.* * * *

(5) In the case of Class 9 warehouses, to provide reasonable assurance of exportation of merchandise withdrawn under the sales ticket procedure of § 144.37(h) of this chapter.

* * * * * * *

PART 144 – WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for part 144 continues to read as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1624. Section 144.3 also issued under 19 U.S.C. 1563; Section 144.33 also issued under 19 U.S.C. 1562; Section 144.37 also issued under 19 U.S.C. 1555, 1562.

2. Section 144.37 is amended by adding a new paragraph (h) to read as follows:

§ 144.37 Withdrawal for exportation.

* * * * * * *

(h) *Class 9 warehouse withdrawals for exportation.*

(1) *Applicability of sales ticket procedure.* Merchandise in a Class 9 warehouse (duty-free store) may be withdrawn for any of the purposes set forth in this subpart. However, only conditionally duty-free merchandise in a Class 9 warehouse intended for exportation or for delivery to persons and organizations set forth in subpart I, part 148, of this chapter, will be eligible for withdrawal under the sales ticket procedure specified in this paragraph.

(2) *Sales ticket content and handling.* Sales ticket withdrawals shall be made only under a blanket permit to withdraw (see § 19.6(d) of this chapter) and the sales ticket shall serve as the equivalent of the supplementary withdrawal. A sales ticket is an invoice of the proprietor's design which will include:

(i) Serial number and date of preparation of each ticket;

(ii) Warehouse entry number or specific identifier, if approved by the district director;

(iii) Quantity of goods sold;

(iv) Brief description of the articles including the size of bottles;

(v) The full name, address, and signature of the purchaser. However, the district director may waive the address and signature requirement (but not the name requirement) for alcoholic beverages in quantities of 4 liters or less and cigarettes in quantities of 3 cartons or less; and

(vi) A statement on the original copy (purchaser's copy) to the effect that goods purchased in a duty-free store will be subject to duty and/or tax without personal exemption if returned to the United States. At the time of purchase, the sales ticket, in triplicate, shall be made out in the name of the purchaser. One copy shall be retained by the proprietor. A permit file copy will be attached to the parcel containing the articles, and the original given to the purchaser. Additional copies may be retained by the proprietor.

(3) *Sales ticket register.* In addition to the records required in § 19.12(a) of this chapter, Class 9 warehouse proprietors shall maintain a sales ticket register or similar accounting record for each warehouse entry. The sales ticket register of the proprietor shall include the following information:

(i) Warehouse entry number;

(ii) Specific identifier, if applicable;
(iii) Sales ticket date and number;
(iv) Description;
(v) Quantity; and
(vi) Current balance.

As each warehouse entry is closed out, the warehouse proprietor shall verify the sales ticket register total with the amount withdrawn so as to account for all merchandise so withdrawn and certify on the register that all the goods have been exported or sold to qualifying persons and organizations under part 148 of this chapter. The sales ticket register shall be included in the permit file folder with or in lieu of the blanket permit summary, as provided in § 19.6(d)(4) of this chapter. A copy of all sales tickets shall be retained by the proprietor for not less than 5 years after the date of the last sales ticket in the entry. In lieu of placing a copy of sales tickets in each permit file folder, the warehouse proprietor may keep all sales tickets in a separate file in numerical sequence by warehouse entry number.

CAROL HALLETT,
Commissioner of Customs.

Approved: August 13, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 20, 1992 (57 FR 37692)]

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19 CFR Parts 18 and 122

(T.D. 92–82)

RIN–1515–AB12

AIR WAYBILL AS IN-BOND DOCUMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to make specific mention of the availability of an air waybill as an in-bond document. Customs previously concluded a successful test program allowing air carriers to forward in-bond shipments using an air waybill as the sole in-bond document. The use of the air waybill for this purpose has facilitated the movement of cargo and the delivery of in-bond freight. Accordingly, the procedure is made available on a permanent basis.

EFFECTIVE DATE: October 23, 1992.

FOR FURTHER INFORMATION CONTACT: Ernie Cunningham, Office of Inspection and Control, (202–566–8151).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In November 1988, Customs commenced a test program allowing air carriers to use the air waybill (AWB) as the sole in-bond document in place of Customs Form 7512 (Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit) and Customs Form 7512–C (Transportation Entry and Manifest of Goods), or Transit Air Cargo Manifest (TACM) documents. These documents are used to move and track merchandise that is transferred in-bond for entry or exportation.

The test using only an AWB for this purpose was designed to take advantage of the unique number, and the detailed information, available on an AWB. A number of air carriers participated in the test wherein the use of the air waybill in this manner was found to facilitate the movement of cargo and the delivery of in-bond freight.

As a result of the successful test, Customs determined to make this procedure available on a permanent basis and to amend the Customs Regulations to reflect this. Accordingly, by notice published in the Federal Register (56 FR 67253) on December 30, 1991, Customs solicited public comment on a proposal allowing air carriers to forward in-bond shipments using an air waybill as the sole in-bond document.

Specifically, in accordance with the test and under the proposed regulatory amendments, air carriers may forward in-bond shipments from the first port of arrival/unlading using an AWB as the in-bond document and the 11-digit AWB number as the in-bond control number. The first three digits of the number are the issuing airline's identification code. The AWB used must record the same information as the universal AWB recognized and accepted by the International Air Transport Association (IATA). The AWB must also contain the final port of destination in the U.S. or the actual ultimate country of destination of the shipment indicated by available airline shipping documents. The ultimate destination must be shown even though the air transportation may be scheduled to terminate in a country prior to the shipment's ultimate destination.

Importers may opt to use this procedure for merchandise entered for immediate transportation, transportation and exportation, and immediate exportation. Such use does not modify any carrier's liability for in-bond freight and does not modify bond requirements already in the Customs Regulations. It is still necessary that the delivering carrier, whether or not it is the initial bonded carrier, surrender the in-bond document as notice of arrival promptly, but no more than two working days after the arrival of any portion of the covered shipment at the port of destination.

District directors will consider individual port factors, such as presence of an operational Manifest Review Unit (MRU), in determining the level of supervision that is necessary in each district.

It is noted that § 122.92(a), Customs Regulations (19 CFR 122.92(a)), already states that, "Customs Form 7512 or other Customs approved documents" shall be used for both entry and manifest. The final rule adopted herein basically amends § 122.92(a) to make specific reference to an AWB as one of those Customs approved documents, as well as making other appropriate conforming changes to Part 18, Customs Regulations (19 CFR Part 18).

One commenter responded to the notice of proposed rulemaking. A discussion of the brief comments submitted is set forth below.

Analysis of Comments

Comment:

It was recommended that Customs reconsider permitting alternate waybill formats to be used, deleting the words, "be in the format, and" from proposed § 122.92(a)(3)(i).

Response:

Customs agrees with this recommendation and the section is amended accordingly. Customs wants to ensure that the information on the air waybill meets its requirements. What is of importance to Customs is not the International Air Transport Association (IATA) format, per se, but rather the substantive information contained therein.

Comment:

It was also recommended that Customs apply the air waybill procedure to all portions of split shipments.

Response:

Customs is unable to do this due to current programming constraints. At present, Customs keeps track of the in-bond shipment of merchandise made on an air waybill by using its unique 11-digit number. Only the first portion of a split shipment of such merchandise may be related to this number, with its in-bond movement being tracked in this manner.

Conclusion

After careful consideration of the comments received and further review of the matter, it has been determined that the amendments with the modification discussed above should be adopted. Also, the word "Customs" appearing before "approved documents" in the first sentence of § 122.92(a), which was omitted in the proposed amendment, is retained, for clarity.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a signifi-

cant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

Part 18

Common carriers, Exports, Freight forwarders.

Part 122

Air carriers, Freight.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth in the preamble, Parts 18 and 122, Customs Regulations (19 CFR Parts 18, 122), are amended as set forth below.

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The general and relevant specific authority citations for Part 18 continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1551, 1552, 1553, 1624;

* * * * * * *

§§ 18.11 and 18.12 also issued under 19 U.S.C. 1484;

* * * * * * *

2. Section 18.11 is amended by revising the first sentence of paragraph (h) to read as follows:

§ 18.11 Entry; classes of goods for which entry is authorized; form used.

* * * * * * *

(h) Either Customs Form 7512, a carnet, or an air waybill (see § 122.92 of this chapter), shall be used as a combined transportation entry, invoice, and manifest. * * *

* * * * * * *

3. Section 18.20 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 18.20 Entry procedure; forwarding.

(a) When an importation is entered for transportation and exportation, except as provided for in subparts D, E, F and G of Part 123 of this chapter (relating to merchandise in transit through the U.S. between two points in contiguous foreign territory), a carnet, three copies of an air waybill (see § 122.92 of this chapter), or four copies of Customs Form 7512 shall be required. * * *

* * * * * * *

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644, 49 U.S.C. App. 1509.

2. Section 122.92 is amended by revising the heading and first sentence of paragraph (a)(1), adding a paragraph (a)(3), and by revising paragraph (b)(1) to read as follows:

§ 122.92 Procedure at port of origin.

(a) *Forms required.*

(1) *Customs Form 7512 or other document.* Customs Form 7512 or other Customs approved documents, such as an air waybill (see paragraph (a)(3) of this section), shall be used for both entry and manifest. * * *

* * * * * * *

(3) *Air waybill.* An air waybill may be used for both entry and manifest. Three copies of the air waybill are required unless the district director deems additional copies necessary. Photocopies of the original air waybill are acceptable. Either preprinted stock air waybills or electronically generated air waybills may be used. The air waybill must:

(i) Contain the information required of a universal air waybill as recognized and accepted by the International Air Transport Association (IATA), be legible and in the English language;

(ii) Display a unique 11-digit number, the first three digits being the air carrier's identification code;

(iii) Display the number of packages based on the smallest external packaging unit (*e.g.*, 14 packages is acceptable, 1 pallet is unacceptable);

(iv) Display the name of the final port of destination in the U.S. or the name of the ultimate country of destination of the cargo indicated by available air carrier shipping documents. The ultimate destination must be shown even though the air transportation may be scheduled to terminate in a country prior to the cargo's final destination;

(v) Be modified to contain the following information which should appear in a block or attachment in the upper right-hand corner as in this

example. The numbers 1–8 correspond to the descriptions that follow; the numbers do not have to appear on the AWB:

(1)	(2)	(3)
Origin	Entry Type	Destination
	(4)	
	Importing Carrier/Flight Number/Arrival Date	
(5)		(6)
Bonded Carrier/Exporter		Date
	(7)	
	Signature of Carrier's Agent (or Exporter)	
	(8)	
Customs Officer		Date

The item numbers correspond to the following information:

Item 1 – Origin:

The numeric district/port code as listed in Schedule D of the Harmonized Tariff Schedules of the United States, or the port where the in-bond entry is presented.

Item 2 – Entry Type:

The appropriate in-bond code number such as I.T./61 for Immediate Transportation, T&E/62 for Transportation and Exportation, and I.E./63 for Immediate Exportation.

Item 3 – Destination:

The numeric district/port code for the intended port of destination for entry or exportation.

Item 4 – Importing Carrier/Flight Number/Arrival Date:

This information serves to identify the shipment in terms of the inward foreign manifest of the importing carrier. The "Arrival Date" is the date of arrival of the importing conveyance in the U.S. This information must be supplied in all instances.

Item 5 – Bonded Carrier/Exporter:

The bonded carrier or exporter who will be liable for the proper movement, handling, and safekeeping of the merchandise once the in-bond movement is authorized by Customs. If this information is not supplied, the in-bond movement will be carried out under the bond of the importing carrier. (See Item 7 for further information on transfer of liability.)

Item 6—Date:

The date of the in-bond entry preparation. Since an in-bond entry can be prepared before the date of entry presentation and/or acceptance, and prior to the actual arrival of the importing conveyance, this date should only be used for duty assessment purposes when the date in Item 8 is left blank. If a date is not present, the date of in-bond preparation will be deemed to be the date of arrival.

Item 7—Signature of Carrier's Agent (or Exporter):

This signature of the authorized agent of the bonded carrier or exporter identified previously (See Item 5) constitutes acceptance of the liability for the in-bond shipment by the party signing. A signature is required except when the in-bond movement is under the bond of the importing carrier. If unsigned, the submission to Customs of an AWB requesting such a movement is evidence of the acceptance of liability if the AWB is approved by Customs.

Item 8—Customs Officer/Date:

Signature of the Customs officer who authorizes the initiation of the in-bond movement and the date of such authorization. Customs will check to make sure merchandise is released only to a bonded carrier. The date is used to start the time limit for completion of the in-bond movement and for consumption entry purposes in accord with § 141.69(b) of this chapter. Customs authorization procedures which use a perforation device are acceptable in lieu of the appropriate Customs signature. The district director will determine whether a signature will be required in this block prior to the time that the cargo is allowed to move.

(b) *Delivery of Customs form to carrier.* (1) *Merchandise entered for immediate transportation without appraisement.* When merchandise is entered for immediate transportation without appraisement, two copies of Customs Form 7512 or Customs approved document, and the duplicate copy of Customs Form 7512–C shall be delivered to the carrier. When an air waybill is used, Customs Form 7512–C is not required.

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: August 10, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 24, 1992 (57 FR 38274)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 12, 1992.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 92–29)

This ruling holds that the term "Tailor made in" or simply "Tailored in" fixed to men's suits and suit jackets does not meet or satisfy the country of origin marking requirements set forth in 19 U.S.C. 1304.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 3, 1991.

File: HQ 734096
MAR–2–05 CO:R:C:V 734096 AT
Category: Marking

MS. LAURA M. DENNY
EDISON BROTHERS STORES, INC.
IMPORT DEPARTMENT
501 N. Broadway
P.O. Box 66995
St. Louis, Missouri 63166–6995

Re: Country of origin marking of imported men's suits and suit-type jackets; "Tailored in" or "Tailor-made in" in lieu of "Made in" or "Product of"; 19 U.S.C. 1304: 19 CFR 134.1(b).

DEAR MS. DENNY:

This is in response to your letter dated March 15, 1991, requesting a country of origin ruling regarding imported men's suits and suit-type jackets.

Facts:

You are proposing to mark your imported suits and suit-type jackets with the phrase "Tailored in" or "Tailor-made in" in place of "Made in"

or "Product of" to indicate the country of origin of the garment. You also state that according to the definition of "Tailored" and "Tailor-made" as found in *Webster's New Collegiate Dictionary*, you believe that the term "Made in" is synonymous with "Tailored in". Further, you claim that the term "tailored" is a standard term used in the garment industry to connote country of origin.

Issue:

Whether the phrase "Tailored in" or "Tailor-made in" to designate the country of origin of imported suits and suit-type jackets satisfies the marking requirements of 19 U.S.C. 1304.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article (emphasis added). The Court of International Trade stated in *Koru North America v. United States*, 701 F. Supp. 229, 12 CIT 1120 (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States v. Friedlaender & Co.*, 27 CCPA 297 at 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Country of origin is defined in 19 CFR 134.1(b) as the country of manufacture, production, or growth of any articles of foreign origin entering the U.S. The question presented in this case is whether the phrase "Tailored in" or "Tailor-made in" indicates that the article was made in the named country, as required by 19 U.S.C. 1304.

In C.S.D. 89–37 (December 1, 1988), Customs ruled that the phrase "Fabric made in U.S.A. Tailored in Honduras" properly indicated that the country of origin of men's shirts was Honduras. In so determining, Customs stated that shirt manufacturers have used the phrase "Tailored in" to mean "Made in" for men's shirts and it has that connotation within the industry. Evidence was presented in support of this conclusion. In HQ 734031 (May 20, 1991), Customs ruled that the term "Tailored in" to designate the country of origin of imported men's shirts satisfied the marking requirements of 19 U.S.C. 1304. The ruling spe-

cifically stated that it applied only to the marking of imported men's shirts.

In this case, instead of marking imported men's shirts, you are proposing to mark imported suits and suit-type jackets with the phrase "Tailored in" or "Tailor-made in" in place of "Made in" or "Product of" to indicate the country of origin of the garment. The proposed marking "Tailored in" would not clearly indicate to the ultimate purchaser the true country of origin of the these types of garments. Although Customs found that the phrase "Tailored in" is synonymous with the phrase "Made in" in the shirt industry, this does not appear to be the case regarding suits. The term "Tailored in" has a different meaning when applied to garments like men's suits and suit-type jackets than with men's shirts. Generally, when applied to suits or suit-type jackets the words "Tailored in" could mean to the ultimate purchaser that some further processing or tailoring has been done to the finished garment. It does not necessarily indicate that the garment was actually manufactured in that country. However, with men's shirts, an ultimate purchaser does not make this same inference (that further processing or tailoring was done to the finished shirt).

Also, as noted above, "Tailored in" is used by the men's shirt industry to connote country of origin. However, according to a Customs National Import Specialist who has been involved with the garment industry for many years, the words "Tailored in" are not standard terms used by the garment industry to connote country of origin of men's suits or suit-type jackets, as you claim.

Unlike the words "Tailored in", the words "Tailor-made in" provide a clearer indication to the ultimate purchaser that the suit or suit-type jacket is manufactured in that country due to the fact that the word "made" is added to the proposed marking. Also, an ultimate purchaser after reading the words "Tailor-made in" would not be confused as to what the country of manufacture of the article is. Generally, one associates that the words "Tailor-made in" mean that the article was manufactured or made in that country. Therefore, use of the words "Tailor-made in" to indicate the country of origin of men's suits or suit-type jackets satisfies the requirements of section 1304.

Holding:

The proposed phrase "Tailored in" to designate the country of origin of imported suits and suit-type jackets does not satisfy the marking requirements of 19 U.S.C. 1304. Use of the words "Tailored-made in" to designate the country of origin of imported men's suits and suit-type jackets does satisfy the marking requirements of 19 U.S.C. 1304.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92–30)

This ruling holds that certain cutting and sewing operations performed on an imported fabric and a pigskin material result in a double substantial transformation of these materials when used to produce a finished product. The cost or value of the imported materials may be included toward the value-content calculation for purposes of the Generalized System of Preferences.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 27, 1992.

File: HQ 556290
CLA–2 CO:R:C:S 556290 WAW
Category: Classification

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
1000 Second Ave., Suite 2200
Seattle, WA 98104–1049

Re: Request for internal advice concerning the eligibility of ski gloves for duty-free treatment under the GSP; substantial transformation; 732623; C.S.D. 90–20; 12.130; 555742; 555189; 554929; 10.195(a); 556104

DEAR SIR:

This is in response to your letter dated September 20, 1991, forwarding a request for internal advice regarding whether certain ski gloves from Thailand are eligible for duty-free treatment under the Generalized System of Preferences (GSP) (19 U.S.C. 2461–2466). A sample of the merchandise was not submitted for review.

Facts:

Palace Industries manufactures two different styles of ski gloves commonly referred to as style 361 and style "claw". The gloves are made of two different types of fabric – NC–700 which originates from Japan, and Duratex, which originates from Taiwan. In addition, the gloves consist of an insulating material referred to as Polar light which is of U.S. origin. The gloves also consist of a pigskin material of Japanese origin. The pigskin is shipped from Japan in irregularly shaped pieces. In Thailand, the leather is cut to shape and sewn onto the palm of the glove for reinforcement purposes. The cut pieces of leather are attached to the cut fabric pieces before the fabric pieces are sewn together to form the glove. You state that the import specialist involved in this case and the National Import Specialist agree that the sewing of a glove from the component parts is "one of the most complex of all sewing operations. It is more complex than sewing a shirt, for instance."

Set forth below is a description of the processes performed in Thailand on the Duratex and Polar light fabrics. Although no description of the processing performed on the NC–700 fabric was provided, we are assuming that the processing of all three fabrics is essentially the same.

(1) The fabric is first shipped into Thailand in bolts;
(2) The fabric is placed on a cutting table and cut into back and palm tranks and other pieces referred to as "fourchettes" and "gussets"; and
(3) The back and palm tranks, the fourchettes and the gussets are then sewn together to form the outer shell of the glove and the insulating "glove within the glove."

The assembly of the gloves involves approximately 14 components, including a D-ring and clip which originate in Thailand.

Issue:

Whether the manufacture of the two types of ski gloves results in a double substantial transformation, thereby permitting the cost or value of the materials imported into Thailand to be included in the 35% value-content requirement for eligibility under the GSP.

Law and Analysis:

Under the GSP, eligible articles the growth, product, or manufacture of a designated beneficiary developing country (BDC), which are imported directly into the customs territory of the U.S. from a BDC may receive duty-free treatment if the sum of (1) the cost or value of materials produced in the BDC, plus (2) the direct costs involved in processing the eligible article in the BDC, is equivalent to at least 35% of the appraised value of the article upon its entry into the U.S. 19 U.S.C. 2463(b).

For purposes of the GSP, a substantial transformation occurs "when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *See Texas Instruments Incorporated v. United States*, 681 F.2d 778, 69 CCPA 151 (CCPA 1982).

According to General Note 3(c)(ii)(A), Harmonized Tariff Schedule of the United States Annotated (HTSUSA), Thailand is a BDC. In addition, based on the information provided, we believe that the merchandise is classified in subheading 6216.00.4600, HTSUSA, which provides for "[g]loves, mittens and mitts: Other: Of man-made fibers: Other gloves, mittens and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts." Articles classified under this provision are eligible for duty-free treatment under the GSP provided they meet all of the requirements.

A. *"Product Of" Requirement:*

To comply with the requirements of the GSP statute, we must first determine whether the bolts of fabric material imported into Thailand become a product or manufacture of that country by being substantially transformed there. The courts have held that a "substantial transformation" occurs "when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process." *See The Torrington Co. v. United States*, 764 F.2d 1563 (Fed. Cir. 1985).

Because the articles in question consist, in large part, of textile products, section 12.130, Customs Regulations (19 CFR 12.130), is applicable. Section 12.130, Customs Regulations (19 CFR 12.130), sets forth criteria for determining whether a textile or textile product has been substantially transformed. Pursuant to the regulations, a textile or textile product will be considered to have undergone a substantial transformation if it has been transformed by means of substantial manufacturing or processing operations into a new and different article of commerce. *See* 19 CFR 12.130(b). According to section 12.130(d)(2), the following will be considered in determining whether merchandise has been subjected to substantial manufacturing or processing operations: (1) the physical change in the material or article; (2) the time involved; (3) the complexity of the operations; (4) the level or degree of skill and/or technology required; and (5) the value added to the article in each country or territory. Any one or a combination of these factors may be determinative and other factors may also be considered. 19 CFR 12.130(d).

Examples of processes which generally will result in a substantial transformation and those which usually will not are set forth in 19 CFR 12.130(e). According to 19 CFR 12.130(e)(iv), the cutting of fabric into parts and the assembly of those parts into the completed article in a foreign country or insular possession will usually result in a substantial transformation of the fabric so as to confer country of origin. In this case, the cutting of the foreign fabric into various shapes and sizes suitable for use as tranks and other glove components, and the assembly of those parts to produce the ski gloves in Thailand, result in a substantial transformation of the imported fabric. Therefore, the ski gloves are considered to be "products of" Thailand for purposes of the GSP.

B. *Double Substantial Transformation Requirement:*

If an article is produced or assembled from materials which are imported into the BDC, the cost or value of those materials may be counted toward the 35% value-content minimum only if they undergo a double substantial transformation in the BDC. *See* section 10.177, Customs Regulations (19 CFR 10.177), and *Azteca Milling Co. v. United States*, 703 F. Supp. 949 (CIT 1988), *aff'd*, 890 F.2d 1150 (Fed. Cir. 1989). That is, the cost or value of the imported fabric and pigskin leather imported into Thailand and used to produce the ski gloves may be included in the GSP 35% value-content computation only if the fabric and the pigskin leather are first substantially transformed into new and different articles of commerce, which are themselves substantially transformed when assembled into the final article—ski gloves.

We have consistently held that the cutting of fabric into specific or defined shapes suitable for use as components in an assembly operation is sufficient to substantially transform the fabric into a new and different article of commerce. *See* Headquarter Ruling Letter (HRL) 555742 dated November 5, 1990, HRL 067823 dated June 2, 1982, HRL 555189 dated June 12, 1989, and C.S.D. 89–27(4) (HRL 554929 dated November 3, 1988). With respect to the facts in this case, we find that the foreign

fabric which is cut into various shapes and sizes (*e.g.*, fourchettes, tranks, and gussets) necessary to produce the ski gloves in Thailand, result in a substantial transformation of the foreign fabric into a new and different article of commerce. In addition, we believe that the ski glove components are intermediate articles which are ready to be put into the stream of commerce where they can be bought and sold. *See Torrington*, 764 F.2d at 1570.

With regard to the pigskin material from Japan, the limited information provided indicates that the pigskin is cut in Thailand to specific sizes and shapes suitable for use in the assembly of gloves. Clearly, the cutting of pigskin into reinforcing glove parts is analogous to the cutting of fabric to specific shapes and sizes and, therefore, results in a substantial transformation.

The next issue to be considered concerns whether the assembly of the cut pieces of fabric and leather to create the finished gloves constitutes a second substantial transformation. In this regard, we have held that, for purposes of the GSP, an assembly process will not work a substantial transformation unless the operation is "complex and meaningful." *See* C.S.D. 85–25, 19 Cust. Bull. 544 (1985). Whether an operation is complex and meaningful depends on the nature of the operation. In making this determination, we consider the time, cost, and skill involved, the number of components assembled, the number of different operations, attention to detail and quality control, as well as the benefit accruing to the beneficiary developing country (BDC) as a result of the employment opportunities generated by the manufacturing process.

In *Texas Instruments, Inc. v. United States*, 681 F.2d 778 (Fed. Cir. 1982), the court implicitly found that the assembly of three integrated circuits, photodiodes, one capacitor, one resistor, and a jumper wire onto a flexible circuit board (PCBA) constituted a second substantial transformation. It would appear that this assembly procedure does not achieve the level of complexity contemplated by C.S.D. 85–25. However, as the court pointed out in *Texas Instruments*, in situations where all the processing is accomplished in one GSP beneficiary country, the likelihood that the processing constitutes little more than a pass-through operation is greatly diminished. Consequently, if the entire processing operation performed in the single BDC is significant, and the intermediate and final articles are distinct articles of commerce, then the double substantial transformation requirement will be satisfied. Such is the case even though the processing required to convert the intermediate article into the final article is relatively simple and, standing alone, probably would not be considered a substantial transformation. *See* HRL 071620 dated December 24, 1984 (in view of the overall processing in the BDC, the materials were determined to have undergone a double substantial transformation, although the second transformation was a relatively simple assembly process which, if considered alone, would not have conferred origin).

With regard to whether a processing operation constitutes a substantial transformation, section 10.195(a), Customs Regulations (19 CFR 10.195(a)), also is relevant. According to 19 CFR 10.195(a), implementing the Caribbean Basin Economic Recovery Act (CBERA), no article shall be considered to have been produced in a CBERA beneficiary country by virtue of having merely undergone simple, as opposed to complex or meaningful, combining or packaging operations. However, 19 CFR 10.195(a)(2)(ii)(D) provides that this exclusion shall not be taken to include:

> A simple combining or packaging operation or mere dilution *coupled with any other type of processing* such as testing or fabrication (e.g., a simple assembly of a small number of components, one of which was fabricated in the beneficiary country where the assembly took place.) (Emphasis added)

This regulation is instructive here inasmuch as the CBERA and GSP programs have similar statutory aims, and the country of origin criteria of the statutes are nearly identical.

We have previously issued several rulings pertaining the country of origin marking of gloves which are cut in one BDC from imported material and sewn in another BDC. In the instant case, you have asked us to determine whether the principles set forth in these rulings will apply. In HRL 732623 dated November 6, 1989, subsequently published as C.S.D. 90–20 (24 Cust. Bull. 10 (March 7, 1990)), cotton industrial work glove pieces were cut in country A, and the parts were sent to country B, where they were sewn together into gloves, turned, pressed and packaged before being exported to the U.S. In this case, we held that the sewing together of cotton industrial work gloves was not a complex operation, and therefore, was not analogous to sewing suit-type jackets, suits or shirts. Furthermore, we stated that although cutting may not involve much labor, it often involves a substantial capital input. For these reasons, we concluded that country A was considered the country of origin of the imported work gloves.

However, we believe that the holding in HRL 732623 is not controlling in regard to the issue presented here: whether the assembly in a BDC of ski glove components, which were cut to shape in the same BDC, results in a second substantial transformation, thereby permitting the cost or value of fabric and leather to be included in the GSP 35% calculation. HRL 732623 involved a determination of the country of origin of the assembled gloves. As previously stated, we have held under certain circumstances, that the double substantial transformation requirement may be satisfied even though the second transformation was a relatively simple assembly process which, if considered alone, would not have conferred origin.

In the instant case, we find that the final assembly of the component parts to form a glove results in a second substantial transformation. Even though we believe that the assembly operation in the instant case, which involves sewing the approximately 14 glove parts together, may

not be complex enough to constitute a substantial transformation by itself, nevertheless, we are of the opinion that the overall processing operations (*i.e.*, cutting, sewing, and packing) performed in Mexico are substantial. In addition, not only does the processing involve a number of component parts and assembly operations, but the glove parts are fabricated in Mexico. Moreover, the assembly processes require a relatively significant period of time as well as skill, attention to detail, and quality control. We believe that the production of the ski gloves clearly results in a significant economic benefit to the BDC from the standpoint of both the value added to each component part and the overall employment generated by the operations. *See* C.S.D. 85–25 dated September 25, 1984 (HRL 071827); HRL 556104 dated September 10, 1991, in which foreign fabric imported into the Northern Mariana Islands to be marked, cut, assembled by various sewing operations, ironed, and packed, undergoes a double substantial transformation when manufactured into men's cotton trousers.

Finally, the fabrication and assembly process involved in producing the ski gloves is not the type of "pass-through" operation which Congress intended to prohibit from receiving GSP benefits. "The provision would not preclude meaningful assembly operations utilizing foreign components, provided the assembly is of significance to the local economy, meets the 35% local content rule, and results in a new and different article." H.R. Rep. No. 98–266, 98th Cong., 1st Sess. 13 (1983). Based on the foregoing analysis, we find that the materials used in the production of the ski gloves have undergone the requisite double substantial transformation.

Holding:

Based on the information provided, we find that the cutting and sewing operations performed on the imported fabric and pigskin material result in a double substantial transformation of the imported materials used to produce the ski gloves. Therefore, the cost or value of the imported materials of Japanese, Taiwanese, and U.S.-origin may be included toward the 35% value-content calculation for purposes of the GSP.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92–31)

This ruling holds that certain U.S. component parts that are assembled into an article (seat belts) in Mexico then returned to the United States before ultimate shipment to Canada do not constitute "originating goods" as that term is defined in the U.S.-Canada Free Trade Agreement (Article 301, Article 302, Annex 301.2; General Note 3(c)(vii).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 12, 1992.

File: HQ 556294
CLA–2 CO:R:C:S 556294 SER
Category: Classification

HERBERT J. LYNCH, ESQ.
SULLIVAN & LYNCH, P.C.
156 State Street
Boston, MA 02109

Re: Eligibility for duty preference under the U.S.-Canada Free Trade Agreement of certain safety restraint systems; Article 301, Article 302, Annex 301.2; General Note 3(c)(vii).

DEAR MR. LYNCH:

This is in response to your letter of September 25, 1991, on behalf of Bendix Safety Restraints Division (Bendix), concerning whether certain safety restraint systems assembled in Mexico qualify as "goods originating" in the U.S. and/or Canada pursuant to the U.S.-Canada Free Trade Agreement (CFTA), and, accordingly, whether Bendix may execute an Exporter's Certificate of Origin attesting to the U.S. origin of the safety restraint systems. In addition, if U.S. and foreign components are used in the assembly of the restraint systems, you ask whether the U.S. components may be considered CFTA-eligible materials.

Facts:

Bendix manufactures automobile safety restraint systems (seat belts) of various configurations. These systems range from the least sophisticated assembly, usually found in the rear center passenger seat, to more complex assemblies which are usually the driver seat safety restraint systems.

This ruling primarily concerns the assembly of the safety restraint systems by Bendix's related company in Mexico. In Mexico, the safety restraint systems will be assembled from fully fabricated components. In most instances, the components will be of U.S. origin. However, a few components may be of foreign origin. After assembly in Mexico, the safety restraint systems will be imported into the U.S. and placed into inventory. They will then be sold and exported to a Canadian automobile manufacturer, who ultimately will incorporate the safety restraint systems into automobiles.

Issues:

1. Whether the safety restraint systems assembled in Mexico entirely of U.S. components, or of U.S. and foreign components, are considered to be "originating goods" pursuant to the CFTA, and, whether an Exporter's Certificate of Origin may be executed by Bendix attesting to the "originating goods" status of the systems.
2. If U.S. and foreign components are used in the assembly of the systems in Mexico, whether the U.S. components qualify as "originating materials" under the CFTA for purposes of the value-content test for the automobiles into which the systems are incorporated.

Law and Analysis:

1. *"Originating Goods" Status for Safety Restraint Systems Assembled in Mexico:*

Article 301 of the CFTA establishes the standards for the Rules of Origin for goods, and, therefore, the eligibility of goods to receive preferential duty treatment under the CFTA. To be an "originating good" under the CFTA, goods must be wholly obtained or produced in the territory of Canada and/or the U.S., or the goods must have been transformed in the territory of either party or both parties so as to be subject to a change in tariff classification as described in Annex 301.2 of the Agreement. *See also*, General Note 3(c)(vii)(B), Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Pursuant to Article 301 of the CFTA, the safety restraint systems would not be "originating goods" under the CFTA. The assembly of the components into the final articles—the safety restraint systems—occurs in Mexico, and therefore, the safety restraint systems, whether comprised wholly of U.S. components or U.S. and foreign components, are not *wholly* obtained or produced in the territory of Canada and/or the U.S. Furthermore, as the safety restraint systems are not transformed in the territory of Canada and/or the U.S. so as to be subject to a change in tariff classification, they do not obtain "originating" status in this manner.

The safety restraint systems are returned to the U.S. prior to shipment to Canada. However, since they do not undergo a transformation in the U.S., pursuant to Article 301, which would subsequently transform them into "originating goods," they do not obtain "originating" status in the U.S. Therefore, since the safety restraint systems are not considered "originating goods" under the CFTA, an Exporter's Certificate of Origin stating that the safety restraint systems are of U.S. origin may not be executed by Bendix.

2. *"Originating Materials" Status for the U.S. Components Assembled in Mexico into the Safety Restraint Systems:*

Article 302 of the CFTA provides that goods exported from the territory of one party originate in the territory of that party only if they meet the applicable requirements of Article 301 *and* are shipped to the terri-

tory of the other party without having entered the commerce of any third country and, if shipped through the territory of a third country, they do not undergo any operations other than unloading, reloading, or any operation necessary to transport them to the territory of the other party, and the documents related to their exportation and shipment from the territory of a Party show the territory of the other Party as their final destination.

The U.S. components, when exported to Mexico where they are assembled into the safety restraint systems, clearly enter the commerce of a third country, and, therefore, would lose their "originating materials" status. In summary, the U.S. components, when exported to Canada, after incorporation into the safety restraint systems in Mexico, are not considered CFTA-eligible materials and cannot be counted as such in the value-content calculation for the automobiles into which the systems are incorporated in Canada.

Holding:

The safety restraint systems, assembled in Mexico, are not considered "originating goods" pursuant to the CFTA requirements, and, therefore, an Exporter's Certificate of Origin attesting to their U.S. origin may not be executed. In addition, the U.S. components used in the assembly of the safety restraint systems in Mexico, are not considered CFTA "originating materials" for CFTA value-content purposes upon importation into Canada.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92–32)

This ruling holds that the assessment of marking duties on seized merchandise which was *properly marked while under Customs supervision* and *prior to liquidation* of the entry is improper within the meaning of 19 U.S.C. 1304(f).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE
Washington, DC, April 6, 1992.

File: HQ 734151
MAR–2–05 CO:R:C:V 734151 AT
Category: Marking

AREA DIRECTOR, JFK AIRPORT
Building 178
Jamaica, New York 11430

Re: Application for further review of Protest no. 1001–0–009702 concerning country of origin marking of imported leather apparel; marking duties; false certification; 19 U.S.C. 1304(f).

DEAR SIR:

This is in response to Protest no. 1001–0–009702 and the Application for Further Review dated December 20, 1990, submitted by Follick & Bessich, P.C. (counsel), on behalf of Club De France, Ltd., Inc., the importer, against your decision to assess marking duties in connection with an entry of imported apparel.

Facts:

Entry for 196 men's suede leather garments (137 jackets and 59 vests) imported from Turkey was made on June 21, 1990. On June 26, 1990, a notice of marking/redelivery (CF 4647) was issued because there was no country of origin marking permanently affixed to the imported garments as required by 19 U.S.C. 1304. The importer signed the CF 4647 on July 6, 1990 and returned it to Customs certifying that the merchandise had been properly marked. However, on July 18, 1990, when Customs officers visited the importer's warehouse to examine the subject merchandise, examination revealed that the leather garments had not been marked with the country of origin. Accordingly, the merchandise was constructively seized on July 19, 1990, under authority of 19 U.S.C. 1595a(c) as having been introduced contrary to law (by means of the false certification) for violation of 19 U.S.C. 1304. The record indicates that on August 18, 1990, the Trade Enforcement Team examined the seized merchandise and determined that it had now been properly marked with the country of origin and was eligible for release. The merchandise was released on August 31, 1990, upon payment of $2,190. The record indicates that the entry in question was liquidated on September 28, 1990 with 10 percent marking duties.

Counsel claims that the assessment of marking duties was improper because the merchandise in question was properly marked with the country of origin after importation under Customs supervision prior to liquidation of the entry, and therefore the requirements provided in 19 U.S.C. 1304(f) were satisfied. Counsel also claims that in submitting the certified marking notice on July 6, 1990, Club De France incorrectly believed that the certification could properly be issued while the marking of the leather garments, which was to commence on that same day, remained actively in process. Counsel states that on July 9, 1990, the assigned contract worker did not report to Club De France's premises to continue marking the leather garments due to the fact that she had severely fractured her leg in an accident and could not return for several weeks. As a result, the garments were not properly marked when Customs inspectional personnel arrived at Club De France's premises on July 18, 1990, to examine the merchandise resulting in the instant seizure. Counsel further contends that after the seizure Club De France immediately secured a second contract worker to complete the marking process which was completed during the week of July 23, 1990 and verified by Customs by letter dated August 30, 1990.

Issues:

Whether the assessment of marking duties is proper in this case.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304, provides that, unless excepted, every article of foreign origin imported in to the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. 19 U.S.C. 1304(f) provides that 10 percent marking duties shall be levied, collected and paid if an imported article is not properly marked with the country of origin at the time of importation and such article is not exported, destroyed or properly marked under Customs supervision prior to liquidation. Under this provision, the importer whose goods are found to be not legally marked is afforded three choices. If he chooses not to correct marking deficiencies he must export or destroy the goods under Customs supervision. Otherwise, the goods must be marked in accordance with the requirements of section 1304 and Part 134, Customs Regulations (19 CFR Part 134), such marking to be accomplished under customs supervision prior to liquidation of the entry.

19 CFR Part 134, implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.51, Customs Regulations (19 CFR 134.51), provides that when articles or containers are found upon examination not to be legally marked, the district director shall notify the importer on Customs Form 4647 to arrange with the district director's office to properly mark the article or container or to return all released articles to Customs custody for marking, exportation or destruction. This section further provides that the identity of the imported article shall be established to the satisfaction of the district director. Section 134.52, Customs Regulations (19 CFR 134.52), allows a district director to accept a certification of marking supported by samples from the importer or actual owner in lieu of marking under Customs supervision if specified conditions are satisfied.

Here, by executing the certificate on the CF 4647 that the merchandise had been properly marked, Club De France indicated to Customs that its choice was to mark. While the choice between exportation, destruction, and marking after importation is not in all cases irrevocable, section 1304(f) provides that if one of these three is not accomplished under Customs supervision prior to liquidation of the entry covering the article the marking duty shall be deemed to have accrued at the time of importation and shall not be remitted in whole or in part nor shall payment be avoidable for any cause. Therefore, as applied here, section 1304(f) would require Customs to collect marking duties upon the failure of Club De France to mark the merchandise under Customs supervision, such duties having accrued when Club De France made entry and secured their release from Customs custody.

The record in this case indicates that Customs constructively seized the merchandise on July 19, 1990, because Club De France submitted a false certification in that the merchandise was not properly marked with the country of origin in accordance with the signed CF 4647. The record further indicates that while the merchandise was under Customs custody as a result of the constructive seizure, Club De France properly marked the seized merchandise with the country of origin as certified by a Customs inspection on August 15, 1990, prior to liquidation of the entry on September 28, 1990. Thus, the question presented in this case is whether it is proper to assess marking duties under section 1304(f) if merchandise that is constructively seized due to the submission of a false certification by the importer, is later marked while the merchandise is still under constructive seizure but prior to liquidation of the entry.

In order to resolve this question a brief review of the legislative history behind the enactment of section 1304(f) (previously codified as section 304(b) of the Tariff Act of 1930, and later amended in the Customs Administrative Act of 1938, as section 304(c)), is in order.

Section 304(b) of the Tariff Act of 1930 provided for the assessment of marking duties against an importer if at the time of liquidation any article or its container was not properly marked with the country of origin unless exported under Customs supervision. Section 304(b) provided in part that:

> if at the time of liquidation any article or its container is not marked, stamped, branded, or labeled in accordance with the requirements of this section, there shall be levied, collected, and paid on such article, *unless exported under Customs supervision* a duty of 10 percent of the value of such article * * * (emphasis added)

Therefore, under the existing law an importer only had two choices to avoid liability for marking duties which were either to properly mark the merchandise with the country of origin or export the merchandise under Customs supervision, prior to liquidation.

However, when Congress enacted the Customs Administrative Act of 1938, changes were made to section 304(b) in which additional choices were provided to the importer for avoiding the liability of marking duties. These additional choices were written in section 304(c) of the 1938 Act and are emphasized by the underlined portions below. As written, section 304(c) provides in part that:

> if at the time of importation of any article (or its container, as provided in section (b)) is not marked) in accordance with the requirements of this section, *and if such article is not exported or destroyed or the article (or its container, as provided in section (b) marked after importation in accordance with the requirements of this section (such exportation, destruction, or marking to be accomplished under custom's supervision prior to liquidation of the entry covering the article, and to be allowed whether or not the article has remained in continuous customs custody)* there shall be levied, collected, and paid upon such article a duty of 10 percent ad valorem, which shall

be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. * * *

Section 304(c) of the 1938 Act contains identical language to the present statute section 304(f) of the Tariff Act of 1930, as amended. Congress' intent in making the above modifications was to provide an importer additional choices to avoid liability for marking duties and to limit the application of the additional duty to those articles which go into the commerce of the U.S. This is illustrated in a conversation between Senator David L. Walsh (Chairman, Senate Subcommittee on Finance) and Stephen J. Spingarn (Office of General Counsel, Department of the Treasury) on Tuesday 25, 1938, during the Senate hearing on H.R. 8099 (House of Representative Bill to amend certain administrative provisions of the Tariff Act of 1930) stated in part below:

> Mr. SPINGARN. Existing law provides for an additional duty of 10 percent ad valorem on all articles when the /articles or their immediate containers are not marked at the time of importation, unless the articles are exported.
> Senator WALSH. What is the additional duty now?
> Mr. SPINGARN. Ten percent ad valorem.
> Senator WALSH. This is exactly the same?
> Mr. SPINGARN. This is exactly the same, with the exception that it limits the application of the additional duty to those articles which go into channels of trade in the United States without being marked as required by law either before or after importation. In other words, at present the article has got to be exported in order to avoid the payment. Under the bill, if the goods are not marked on arrival, in order to avoid the payment of the 10 percent extra duty this marking may be performed under Customs supervision at the expense of the importer. The goods can then go into commerce without the payment of that 10 percent additional marking duty. (Emphasis added).

Congress also intended that marking duties should not be construed as penal. This is shown by the supplementary language "which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause" which was added in section 304(c).

The United States Customs Court stated in *A.N. Deringer, Inc. v. United States*, 51 Cust. Ct. 21, C.D. 2408 (1963), that the conditions to impose liability for marking duties under section 304(c) are two: First, that the article is not at the time of importation marked as the statute requires; and second, that if not so marked when imported, it has not prior to liquidation been (a) marked properly under Customs supervision, or (b) exported under Customs supervision, or (c) destroyed under Customs supervision. When these two events concur, the marking duty is imposed by section 304(c), and it shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. The court

stated that "those who import goods into the United States accept certain responsibilities that have been laid on them by Congress. One such responsibility, and an important one, is to see that imported merchandise of foreign origin is properly marked to show the country of origin, before it enters into the commerce of the United States." (Emphasis added).

Customs also follows this construction with respect to the assessment of marking duties. In HQ 731775 (November 3, 1988), Customs ruled that two prerequisites must be present in order for it to be proper to assess marking duties under 19 U.S.C. 1304(f). These two prerequisites are:

> 1. the merchandise was not legally marked at the time of importation, and
>
> 2. the merchandise was not subsequently exported, destroyed or marked under customs supervision prior to liquidation. (Emphasis added).

In this case, the assessment of marking duties is not proper due to the fact that the merchandise was properly marked under Customs supervision (albeit under constructive seizure by Customs) *prior to liquidation of the entry*. The record indicates that the constructively seized merchandise was released from Customs custody on August 31, 1990 properly marked with the country of origin. The record also indicates that the entry for this merchandise was liquidated on September 28, 1990 almost a month after release of the merchandise. Therefore, the merchandise entered the commerce of the U.S. properly marked with the country of origin prior to liquidation of the entry. Although the merchandise was properly marked while under constructive seizure by Customs, we find that this still satisfies the requisite of being marked under Customs supervision. If we were to assess marking duties in this case, we would be in conflict of Congress' intent for enacting section 304(c) which was to impose such duties only when not legally marked merchandise entered the commerce of the U.S.

Holding:

The assessment of marking duties in this case was not proper due to the fact that the constructively seized merchandise was properly marked under Customs supervision with the country of origin *prior to liquidation of the entry*. accordingly, you are directed to grant the protest. A copy of this decision should be attached to the Customs Form 19, to be sent to the protestant.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92–33)

This ruling addresses the proper country of origin marking requirements for small imported automobile engine parts as well as marking requirements for the packaging of these parts occurring in the United States (19 U.S.C. 1304, 19 CFR 134.32(d), 19 CFR 134.34, 19 CFR 134.41, 19 CFR 134.46 19 CFR 134.47).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 13, 1992.

File: HQ 734285
Mar–2–05 CO:R:C:V 734285 AT
Category: Marking

THOMAS J. O'DONNELL, ESQ.
SONNENBERG, ANDERSON, O'DONNELL & RODRIGUEZ
200 West Adams Street
Suite 2625
Chicago, Illinois 60606

Re: Country of origin marking of small imported engine parts imported from various foreign countries; conspicuous; trademark; close proximity; U.S. locality; 19 CFR 134.34; 19 CFR 134.46.

DEAR MR. O'DONNELL:

This is in response to your letters dated August 7, 1991, January 10 and March 17, 1992, on behalf of AE Clevite, Inc., requesting a ruling on the country of origin marking of small imported engine parts which are to be packaged in the U.S. Samples of the small engine parts and the containers in which the parts are to be repackaged were submitted with your letters.

Facts:

You state that AE Clevite, Inc., and its affiliated companies manufacture and distribute internal engine parts for automobiles and heavy duty engines. You also state that although the majority of the parts sold by AE Clevite are made in the U.S., AE Clevite now intends to import parts from foreign countries. Those parts which will be imported are to be repackaged in cardboard boxes which are then distributed to retail and auto stores for sale to consumers. The parts will be repackaged in one of two different ways depending on the type of part.

For small engine parts, each individual part is to be repackaged into a small cardboard box. Each cardboard box will be printed in white lettering with the words "Michigan 77" on the top and two side panels of the box ("Michigan 77" is a registered trademark of AE Clevite). The front

panel[1] of each box will be marked with the part's country of origin, part number and size by either printing it on the label or by having an adhesive label attached to the front label.[2] The country of origin is printed in black lettering approximately 9 points (a point is a unit of type measurement equal to 0.01384 inch or nearly 1/72 in., and all type sizes are multiples of this unit). On the bottom of each box near the left-hand corner AE Clevite's company address "Collierville, Tennessee 38017–2919 USA" is printed in black lettering approximately 4.5 points. Directly across, on the bottom right-hand corner of the box the words "See Part Number Label for country of Origin" will also be printed in black lettering. None of the individual engine parts are marked with the country of origin.

In the case of engine bearings, these small cardboard boxes will then be wrapped in a four sided cardboard wrapper, which allows the end panels of the smaller boxes to be clearly seen. Such wrappers may contain four, six, or eight of the smaller boxes.[3] If the part is larger, only one box may be inserted in the outside wrapper. Each outside wrapper will be marked in the same manner. The words "Michigan 77" are printed in white lettering on the top and two side panels of each wrapper. The bottom left-hand corner of the wrapper is marked with AE Clevite Inc., company's address "Collierville, Tennessee 38017–2919 USA" in black lettering approximately 4.5 points. The bottom right-hand corner of the wrapper is marked "See Part Number Label For Country of Origin" also in black lettering. The front panel of each of the smaller boxes which contain the individual part are marked with the country of origin in black lettering approximately 5 points along with the part number and size. This information will either be printed on the front panel or will appear on an adhesive label attached to the front panel. None of the individual engine bearings are marked with their country of origin.

You state that both the outside wrappers and stand-alone boxes can contain different parts and must be printed and available before the country of origin of their contents can be known. Also, you state that it is impossible for the consumer to purchase the parts without checking the part number label, and therefore the label is crucial to the buying decision as the part number must be carefully checked. Furthermore, you state that the merchandise is always displayed at the point of purchase with the part number panel facing out. Otherwise, neither the store clerks nor the customers could locate the merchandise in any efficient manner. Based on these claims, you assert that marking the stand-alone boxes and outside wrappers "See Part Number Label for Country of Origin" is the most efficient way to mark the country of origin of the individual engine parts since this method of marking will guarantee that the consumer will see it prior to making a purchasing decision.

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[1] Front panel for purposes of this ruling is the same as part number label referred to in the ruling request.
[2] The submitted sample is printed with "Made in Japan", part number and size on the front panel rather than being marked by means of an adhesive label.
[3] Samples of each type of wrapper 4, 6 and 8 were submitted for examination.

Issues:

Whether it is acceptable to mark the stand-alone boxes and outside wrappers in which the imported engine parts are repackaged with the country of origin in lieu of marking the parts themselves?

Whether the country of origin marking on the stand-alone boxes and outside wrappers containing imported engine parts and marked in the manner described above satisfies the requirements of 19 CFR 134.46 and 19 CFR 134.47?

Whether the country of origin marking on the front panel of the stand-alone boxes and small boxes satisfies the marking requirements of 19 U.S.C. 1304 and 19 CFR 134.41?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was that he marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302, C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.1(d), Customs Regulations (19 CFR 134.1(d)) defines ultimate purchaser as "generally the last person in the U.S. who will receive the article in the form in which it was imported." The definition then gives examples of who might be the ultimate purchaser if the imported article is used in the manufacture, if the imported article is sold at retail in its imported form and if an imported article is distributed as a gift. If an imported article is to be sold at retail in its imported form, the purchaser at retail is the ultimate purchaser. In this case, the ultimate purchaser of the consumer who purchases the product at retail.

Are the Engine Parts Excepted from Marking?

An article is excepted from marking under 19 U.S.C. 1304 (a)(3)(D) and section 134.32(d), Customs regulations (19 CFR 134.32(d)), if the marking of a container of such article will reasonably indicate the origin of such article. However, since the engine parts are not imported in the stand-alone boxes or small boxes with outside wrappers, whether the engine parts are excepted from individual marking under 19 CFR 134.32(d) is for the district director to decide. In this regard section 134.34, Customs Regulations (19 CFR 134.34), provides that an exception may be authorized in the discretion of the district director under 19 CFR 134.32(d) for imported articles which are to be repacked after re-

lease from Customs custody under the following conditions: (1) The containers in which the articles are repacked will indicate the origin of the articles to an ultimate purchaser in the U.S.; (2) The importer arranges for supervision of the marking of the containers by Customs officers at the importer's expense or secures such verification, as may be necessary by certification and the submission of a sample or otherwise, of the marking prior to the liquidation of the entry.

Assuming that the district director is satisfied that the imported parts will be repacked in the manner set forth below, and that the other conditions set forth in 19 CFR 134.34 are met, the district director may authorize an exception under 19 CFR 134.32(d), in which case marking of the engine parts themselves would not be required.

Assuming the Engine Parts are Excepted from Marking Under 19 CFR 134.32(d) and 19 CFR 134.34, are the Containers Properly Marked?

In determining whether the marking is acceptable, Customs will take into account the presence of words or symbols on an article which may mislead the ultimate purchaser as to the country of origin. Consequently, if the words "United States," or "America," the letters "U.S.A.," any variation of such words or letters, or the name of any city or locality other than the country of origin appear on the imported article, special marking requirements are triggered.

An issue raised in this case involves the application of two related provisions of the marking regulations, 19 CFR 134.46 and 19 CFR 134.47. The application of the special marking requirements set forth in these provisions is triggered by the presence of the words "Michigan 77" printed on the top and two side panels and the words "Collierville, Tennessee" printed on the bottom left-hand corner of the stand-alone boxes and outside wrappers.

Both provisions serve the same purpose of preventing ultimate purchasers from being misled or deceived when the name of a country or place other than the country of origin appears on an imported article or its container. The critical difference between the two provisions is that section 134.46 requires that the name of the actual country of origin appear "in close proximity" to the U.S. reference and in lettering of at least comparable size. By contrast, 134.47 requires less, providing that when the name of a place other than the country of origin appears as part of a trademark or trade name or as part of a souvenir marking, the name of the actual country of origin must appear in close proximity to the place "or in some other conspicuous location". In other words, the country of origin marking needs only to meet the general standard of conspicuousness. In either case, the name of the country of origin must be preceded by "Made in," "Product of," or words of similar meaning.

As applied here, due to the fact that "Michigan 77" is a trademark of AE Clevite, Inc., the less stringent requirements of 19 CFR 134.47 apply. Accordingly, the actual country of origin of the engine parts must satisfy the general standards of conspicuousness and must be preceded by the words "Made in", "Product of", or words of similar meaning.

However, with respect to the marking "Collierville, Tennessee" the stricter requirements of 19 CFR 134.46 apply. Accordingly, the actual country of the origin of the engine parts must appear "in close proximity" to the U.S. reference and in lettering of at least a comparable size. Therefore, the critical issue prevent in this case is whether the marking "See Part Number Label For Country of Origin" on the same panel as the words "Collierville, Tennessee, satisfies the country of origin marking requirements of 19 CFR 134.46.

Customs has previously approved country of origin markings which do not designate a specific country of origin in close proximity to the U.S. reference but instead directs the ultimate purchaser to a conspicuous location where the country of origin can be found on the article. For example, in HQ 732374 (July 7, 1989), Customs determined that the language "Refer to neck label for country of origin" printed on the outside of a poly bag containing men's dress shirts immediately beneath a U.S. address, was acceptable if the neck label displaying the name of the country of origin in each shirt was easily visible to he ultimate purchaser. *See also* HQ 732099 (November 3, 1989), in which Customs approved the country of origin marking "See Bulb For Country of Origin" where the bulbs were individually marked and their containers were unsealed.

Similarly in this case, we find that the proposed method of marking satisfies the requirements of 19 CFR 134.46. The words "See Part Number Label for country of Origin" appears in close proximity to the U.S. reference and is easy to see. Moreover, the actual country of origin marking is located in a place where the ultimate purchaser would expect to find the marking since other essential information such as the part number and size of the specific engine part also appears on the front panel. An ultimate purchaser would be expected to examine the front panel to find out the part number and size of the particular part prior to purchasing it. The country of origin markings can also be easily seen since the size of the lettering is very large (either 5 or 9 point), is in contrasting color (black) and can be easily read without strain. We further find that the country of origin marking is permanent because the marking will be either printed or an adhesive label will be attached to the front panel.

Based on the above considerations, we also find that the country of origin marking on the front panel of either the stand-alone boxes or small boxes is conspicuous within the meaning of 19 U.S.C. 1304, 19 CFR 134.41 and 19 CFR 134.47.

Holding:

Assuming the district director authorizes an exception from marking the engine parts pursuant to 19 CFR 134.32(d) and 19 CFR 134.34, the proposed method of marking described above satisfies the requirements of 19 U.S.C. 1304 and 19 CFR Part 134.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92–34)

This ruling addresses the proper country of origin marking requirements for automotive water pumps that are assembled with imported parts as well as parts of domestic manufacture (19 U.S.C. 1304, U.S. Customs Service Headquarters Ruling 732940 dated July 5, 1990 is revoked).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 25, 1992.

File: HQ 734566
MAR–2–05 CO:R:C:V 734566 AT
Category: Marking

JACALYN N. KOLK, ESQ.
HILTON, HILTON, KOLK & PENSON
1610 Beck Avenue
Panama City, Florida 32405

Re: Country of origin marking of imported components used in the manufacture of automotive water pumps; 19 U.S.C. 1304; 19 U.S.C. 1304 (a)(3)(G); 19 CFR 134.32(g); 19 CFR 134.35; 19 CFR 134.1(d); HQ 732940 revoked; *Gibson-Thomsen; Friedlaender; National Juice; Belcrest Linens; National Hand Tool;* T.D. 67–173; C.S.D. 80–111; C.S.D. 89–110; C.S.D. 89–129; C.S.D. 90–51; HQ 709570; HQ 730069; HQ 732196; HQ 733676; HQ 734259; substantial transformation; concealed marking; assembly; addition of domestic components.

DEAR MS. KOLK:

This is in response to your letter of March 25, 1992 on behalf of Eastern Industries, Inc. (Eastern), requesting a ruling on the country of origin of imported components used in the manufacture of automotive water pumps. A sample of a completed water pump and the unassembled components were submitted with your letter for review. As we requested, you have provided us with further cost and assembly information by letter dated May 5, 1992. This request supplements Eastern's original ruling request of November 30, 1989, and April 6, 1990, and Customs subsequent Headquarters Ruling Letter 732940 dated July 5, 1990.

Facts:

You state that Eastern Industries imports components of water pumps which it then assembles for sale to automotive parts stores. Each completed water pump generally consists of a casting, bearing, impeller, hub, seal, gasket, and in certain circumstances a backplate. You claim that Eastern carries a water pump line of approximately 600 part numbers, of which, approximately 120 part numbers are manufactured by Eastern. From the additional cost information that you submitted on May 5, 1992, it appears that Eastern sells approximately 106 different

water pump models and that any component can be either domestically or foreign made. You also state that Eastern does not offer for sale nor sell the individual components, but only utilizes said components in the manufacturing process to produce water pumps.

The assembly of the water pump initially involves random checking of a given lot for casting quality, machining quality and finish. Parts, *i.e.* bearings, seals, hubs, impellers, back plates and gaskets are randomly checked by Eastern's quality control personnel. Following this, tooling is designed and built, then tested for accuracy. A casting is heat treated, then sent forward for assembly. The assembly procedure involves the combining of the bearing, hub, impeller, casting, seal, backplate, and gaskets. Following assembly, a completed water pump is subjected to a 100% vacuum test. A final quality control check precedes delivery to Eastern's shipping department, where each pump is boxed with any miscellaneous parts required and sent to automotive parts stores. No information was submitted which suggests that the assembly procedure is complex.

During the preliminary planning of a production number, samples of each component in a particular water pump are submitted to vendors for quotation, both domestically and foreign. Although you state that most of the castings are of foreign origin, at times, the castings may be purchased domestically and the other components, such as a bearing, hub or impeller may be sourced from a foreign vendor. Each part number is analyzed to determine whether it will be profitable to put the new number into production, and thus it is important to be able to source a quality component at the lowest price. Consequently, various sources are used, both domestic and foreign.

Issue:

What are the country of origin marking requirements of imported water pump components assembled by Eastern from imported and domestic parts?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in *Koru North America v. United States*, 701 F.Supp. 229, 12 CIT 1120 (CIT 1988), that "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States v. Friedlaender & Co.*, 27 CCPA 297 at 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an

inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

The country of origin marking requirements of imported water pump components that are assembled by Eastern in the U.S. with domestic parts depend upon whether Eastern is the ultimate purchaser of the imported pump components.

The "ultimate purchaser" is defined generally as the last person in the U.S. who will receive the article in the form in which it was imported. 19 CFR 134.1(d). If an imported article will be used in domestic manufacture, the manufacturer may be the "ultimate purchaser" if [s]he subjects the imported article to a process which results in a substantial transformation of the article. However, if the manufacturing process is a minor one which leaves the identity of the imported article intact, the consumer of user of the article, who obtains the article after the processing, will be regarded as the "ultimate purchaser." 19 CFR 134.1(d)(1) and (2).

SUBSTANTIAL TRANSFORMATION AND DOMESTIC ASSEMBLY OPERATIONS

For country of origin marking purposes, a substantial transformation occurs when articles lose their identity and become new articles having a new name, character or use. *United States v. Gibson-Thomsen Co.*, 27 CCPA 267 (1940); *National Juice Products Association v. United States*, 10 CIT 48. Under this principle, the manufacturer or processor in the U.S. who converts or combines the imported article into a different article will be considered the "ultimate purchaser" of the imported article, and the article shall be excepted from marking. However, the outermost containers of the imported articles must be marked. 19 CFR 134.35. The issue of whether a substantial transformation occurs is determined on a case-by-case basis.

In determining whether the combining of parts or materials constitutes a substantial transformation, the issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linen v. United States*, 6 CIT 204, 573 F.Supp. 1149 (1983), aff'd, 2 Fed.Cir. 105, 741 F.2d 1368 (1984). Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See*, C.S.D.s 80–111, 89–110, 89–129, 90–51.

The issue involved in this case is whether the imported components which are combined in the U.S.to form a completed water pump are substantially transformed into a new article having a new name, character or use.

In this case, review of the completed water pump and unassembled components indicates that the water pump is comprised of four essential components, which are the casting, bearing, impeller and hub. This is also supported by the fact that in most cases the cost of these individ-

ual parts (as indicated by the additional cost information provided to Customs by your letter dated May 5, 1991), exceeds the cost of any other component used to make the completed water pump, irrespective of whether the individual component is domestic or foreign.[1] Thus, it is our decision to only focus on these four essential components for purposes of determining whether a substantial transformation occurs as a result of the U.S. operations performed.

You contend that Eastern's manufacturing process of assembling both domestic and foreign components into a completed water pump in the U.S. results in a substantial transformation of the imported article, and that Eastern is the "ultimate purchaser" of the imported components, and marking of the outermost container in which the articles are imported is sufficient to indicate the country of origin. We disagree.

In *National Hand Tool Corp., v. United States*, Slip Op. 92–61 (April 27, 1992), the Court of International Trade held that imported hand tool components which were used to produce flex sockets, speeder handles and flex handles were not substantially transformed when further processed and assembled in the U.S. One of the factors considered by the court in reaching its conclusion was that the name of the imported components did not change as a result of the U.S. processing and assembling operations. The court found that the name of each article imported had the same name in the completed tool. In support of this conclusion, the court cited the following example:

> "For example, when the lug or "G-head", component of a flex handle imported from Taiwan (Ex. E) was shown, plaintiff's witness called it a "G-head." When the government counsel asked the name of the part where the lug component is attached to a completed flex handle (Ex. J.), the witness also called it a "G-head."

The court also considered whether the use of the imported components changed as a result of the processing and assembling operations performed in the U.S. In finding that the use of the imported components did not change, the court stated that the use of the imported articles was predetermined at the time of importation due to the fact that each component was intended to be incorporated in a particular finished mechanics' hand tool. Although the court recognized the fact that only one predetermined use of imported articles does not preclude the finding of substantial transformation (*See, Torrington Co., v. United States*, 764 F.2d. 1563 (1985)), it went on to say that the determination of substantial transformation must be based on the totality of the evidence.

Similarly, based on the totality of the evidence in this case, we find that none of the four essential components of a completed water pump is substantially transformed when it is combined with the other components, due to the fact that the U.S. operations do not change the name, character or use of the said four components. Examination of the four

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[1] We note that the casting in all 106 pump models was the most costly component of the pump.

components reveals that they are all completely finished articles. No further processing needs to be performed to the individual components in the U.S. except assembly of the various components. In fact both the casting and hub already have the requisite number of holes drilled into them to assure proper mounting in the automobile. Like the hand tool components in *National Hand Tool*, an imported casting, bearing, impeller or hub has the same name after assembly. Although each component becomes an essential part of a completed water pump, each component is still referred to as a casting, bearing, impeller or hub after assembly. Thus, none of the essential components would change in name as a result of the U.S. operations. Likewise, as in *National Hand Tool*, the use of an imported casting, bearing, impeller or hub is predetermined at the time of importation. Each component is intended to be incorporated in a water pump. Also, as you state, none of the components are to be sold individually or as replacement parts, but are only used in the manufacturing of water pumps by Eastern. Clearly, these essential components do not change in character as a result of the assembly operation. After being assembled into the completed water pump the form of a casting, bearing, impeller or hub remains the same of that of its original shape and form. There is no change in the components' microstructure or chemical composition after assembly. *See Ferrostaal Metals Corp., v. United States*, 11 CIT 470, 664 F.Supp. 535 (1987). In addition, there is no indication that the assembly operation is complex.

APPLICABILITY OF HEADQUARTERS RULING LETTER (HQ) 732940

In HQ 732940 (July 5, 1990), issued to Eastern, Customs ruled that imported castings were substantially transformed in the U.S. when assembled with domestic components into a completed water pump and were not required to be individually marked. (No samples of either the individual components or the finished water pump were submitted prior to the issuance of the ruling). In reaching this conclusion, Customs noted that although the casting was generally the most costly component and was clearly an essential component of a water pump, other costly domestic components (bearing, impeller, hub, seal) were added which were also essential to the functioning of the water pump. Customs further noted that the addition of the impeller (an essential component) along with a domestic bearing, hub and seal was essential to create a functional article of commerce. (Emphasis added).

You contend that HQ 732940 should either already or should be amended to except from marking all foreign components used in the assembly of Eastern's water pumps, regardless of the origin of the various other components. We disagree.

As set forth above, Eastern proposes to use any amount of foreign components with other domestic components in the assembly of its water pump models, including any number of the four essential components. This we find to be outside the scope and rationale of HQ 732940. In that ruling we emphasized that a substantial transformation occurred due to the fact that all the essential components were domestic,

except for the castings and/or gaskets. However, in this case one or more essential components added to the completed water could be foreign. This certainly is outside the scope of our previous holding.

Furthermore, after examination of the samples you have now submitted and in light of the recent *National Hand Tool* case decided after the issuance of HQ 732940, we find that we must reconsider the substantial transformation issue presented in HQ 732940 in accordance with the holding in that case. The casting is the most costly and largest component used in the completed water pump which remains visible after it is assembled with the other components. Under the rationale in *National Hand Tool* the casting can not be considered to be substantially transformed when merely assembled with the other essential components. As we have decided above, none of the essential components is substantially transformed when assembled in the U.S. Each essential component, including the casting, does not change in name, character or use as a result of the assembly. Accordingly, we are revoking HQ 732940. However, as set forth in the holding below, in order to allow Eastern time to adjust to the new requirements for these castings, the effective date of this portion of our ruling is delayed until September 23, 1992.

MARKING EXCEPTION UNDER 19 U.S.C. 1304(a)(3)(G) AND 19 CFR 134.32(g) FOR IMPORTED WATER PUMP COMPONENTS

In the alternative, you state that regardless of whether Customs finds that the foreign imported components are substantially transformed as a result of the U.S. operations, the imported components are excepted from country of origin marking under 19 U.S.C. 1304(a)(3)(G) and 19 CFR 134.32(g) and only the outermost containers must be marked with the country of origin.

Pursuant to 19 U.S.C. 1304(a)(3)(G) and 19 CFR 134.32(g), an imported article is excepted from marking if it is to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any country of origin marking would necessarily be obliterated, destroyed, or permanently concealed. Customs has ruled that articles excepted from marking under these provisions at the time of importation must be marked to indicate the country of origin after processing unless such processing constitutes a substantial transformation. The purpose of such requirement is to ensure that the ultimate purchaser is advised of the country of origin. *See*, HQ 732196, May 16, 1989; HQ 733676, December 6, 1990.

In this case, some of the water pump components, such as the impeller, may not remain visible after assembly. Any such components would be excepted from marking at the time of importation pursuant to 19 U.S.C. 1304(a)(3)(G) and 19 CFR 134.32(g), since any marking thereon would necessarily be permanently concealed during the U.S. processing. However, in accordance with the above rulings, the completed water pump must be marked to indicate the country of origin of the various components, including those that are obscured during assembly.

PRACTICAL CONSIDERATIONS

In determining the marking requirements of the imported water pump components that are the subject of this ruling request, various practical considerations should be considered. These include the fact that Eastern sells numerous models of water pumps, and that, according to its submission, any of the individual components can be either domestically or foreign made. As provided above, and in light of the recent *National Hand Tool* case, none of the four essential components whether domestic or foreign is substantially transformed when assembled in the U.S. into a completed water pump and therefore must be marked with its country of origin. However, some of the components will be concealed during the assembly process and are excepted from marking at the time of importation on this basis, while others will not. Accordingly, the various components are subject to different marking requirements depending on how they will be used by Eastern. This makes compliance with marking requirements at the time of importation difficult.

In view of these practical considerations, in order to facilitate marking while at the same time providing adequate notice to the ultimate purchaser of the country of origin, we will permit Eastern to import the various components used in the assembly of the water pumps without country of origin marking provided:

1. the containers in which such components are imported are marked to indicate the country of origin of their contents

2. Eastern certifies to Customs at the time of entry that the finished water pump will be marked to indicate the country of origin of the essential foreign components used therein. For purposes of this requirement, the essential components of the water pump include the casting, impeller, bearing and hub. A single, centrally-located, country of origin marking on the finished article (or its container[2]) that denotes the actual countries of origin of the essential foreign components of the water pump, but does not specify with particularity which component comes from which country is acceptable. If the pump contains essential domestic components, this may be noted. The fact that the pumps are assembled in the U.S. may also be included. For example, Model No. 18–008, which utilizes a casting, impeller and hub from Taiwan and a bearing from the U.S. could be marked, "Assembled in U.S. from components manufactured in Taiwan and U.S." Alternatively, "Components Made in Taiwan", or "Components Made in Taiwan and U.S." are acceptable markings.

3. Customs officials at the port of entry are satisfied that the imported water pump components will be used by Eastern only in the assembly of automotive water pumps and will not otherwise be sold and that Eastern is marking the completed pumps as set forth above.

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[2] The marking of the container is acceptable only if the district director is satisfied that in all reasonably foreseeable circumstances the water pump will reach the ultimate purchaser in such container.

Failure by Eastern to comply with its certification will result in the imposition of marking duties and/or other appropriate measures.

Holding:

In view of the Court of International Trade's recent holding in *National Hand Tool* none of the essential components (casting, bearing, impeller and hub) of a completed water pump is substantially transformed when assembled in the U.S., and the imported components are subject to marking as set forth above. HQ 732940 is revoked.

In order to provide Eastern time to adjust its marking practices for the castings which were the subject of HQ 732940 to the requirements set forth herein, any castings which are entered or withdrawn from warehouse for consumption prior to September 23, 1992, which are to be combined with domestic components, as described in HQ 732940, are not subject to the above marking requirements. With respect to other imported components which are outside the scope of HQ 732940, this ruling is effective immediately.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

General Notice

COUNTRY OF ORIGIN MARKING TRADE FORUMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of trade forums on country of origin marking.

SUMMARY: The U.S. Customs Service is sponsoring three Trade Forums on Country of Origin Marking. These sessions will be of particular interest to importers, brokers, sureties and others, but domestic manufacturers and members of the public are also welcome to participate. Trade Forums will take place in Seattle on September 16, 1992; in New York City on October 2, 1992; and in Washington on October 5, 1992. Seating will be on a first-come, first-served basis in Seattle. For the New York and Washington Forums reservations should be made through the offices designated below. Customs requests that attendance be limited to no more than two persons for each organization represented.

FOR FURTHER INFORMATION CONTACT:

Seattle, September 16, 1992:

Mark Peterson, U.S. Customs Service, 1000 2nd Ave., Suite 2000, Seattle, WA 98104–1049, (206) 553–4993; fax (206) 553–2466. Forum to be held at Red Lion Hotel Seatac, 18740 Pacific Highway South, Seattle, WA 98188.

New York, October 2, 1992:

Jim Rohan, U.S. Customs Service, 6 World Trade Center, Room 737, New York, NY 10048, (212) 466–4507; fax (212) 466–4507. Forum to be held at New York Marriott Financial Center, 85 West Street, New York, NY 10006.

Washington, DC, October 5, 1992:

Sherri Lewis, U.S. Customs Headquarters, 1301 Constitution Ave., N.W., Washington, D.C. 20229, (202) 927–6748; fax (202) 927–1969. Forum to be held at Hyatt Regency Hotel Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202.

DATES: There is no deadline for registration, but Customs expects a significant number of attendees and space may be limited.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs previously announced its plans for these Trade Forums in a notice published in the *Federal Register* on April 27, 1992 (57 Fed. Reg. 15355). In response to the opportunity offered in that Notice, numerous written comments have been submitted addressing various aspects of the marking laws and their enforcement.

The Trade Forums will be conducted on an open-ended basis intended to elicit the fullest possible public participation and input. During the morning session the full range of marking issues will be open for examination. It is anticipated that in the afternoon a number of working groups will be formed to draft proposals on specific topics identified as being of greatest interest. The Forums will begin at approximately 9:00 AM and conclude at approximately 4:00 PM.

The proposals developed at the Trade Forums, together with the comments already received, will be the basis for a report to the Commissioner of Customs. A copy of this report will be provided to every participant.

Dated: August 19, 1992.

JOHN B. O'LOUGHLIN,
Acting Assistant Commissioner,
Commercial Operations.

[Published in the Federal Register, August 26, 1992 (57 FR 38712)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 151

EXAMINATION OF WOOL AND HAIR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to remove references to estimation of clean yield of wool or hair by non-laboratory method and to eliminate Customs Form 6451, Notice of Percentage Clean Yield and Grade of Wool or Hair. The proposed amendments are intended to conform the regulations to current Customs procedures which no longer include informally estimating the clean yield of wool or hair and notifying the importer of that estimate. Determination of the clean yield of wool or hair would thus be made on a case-by-case basis only through analysis performed in a Customs or commercial laboratory.

DATES: Comments must be received on or before October 20, 1992.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, Room 2119, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Ira Reese, Office of Laboratories and Scientific Services (202–927–1060).

SUPPLEMENTARY INFORMATION:

Background

Subpart E within Part 151, Customs Regulations (19 CFR Part 151), covers examination and testing procedures applicable to imported wool and hair for tariff purposes. Sections 151.61 through 151.75 have reference to wool and hair subject to duty at a rate per clean kilogram under the Harmonized Tariff Schedule of the United States (HTSUS), and section 151.76 covers wool for which classification under the HTSUS is also controlled by the grade of the wool.

As regards the determination of clean yield, sections 151.61 through 151.75 refer to two procedures performed by Customs: (1) estimation of clean yield content by a non-laboratory method involving an examination by the appropriate Customs officer and with notice of the results of

the examination provided to the importer on Customs Form 6451, Notice of Percentage Clean Yield and Grade of Wool or Hair, and (2) testing for clean yield content in a Customs laboratory with the results provided to the importer on Customs Form 6415, Laboratory Report. With regard to determination of the grade of wool, section 151.76 simply refers to an examination for grade and provides for notification to the importer by mail if the determination of grade through that examination will result in the assessment of duty at a higher rate than that claimed by the importer; although the regulation does not specify the form to be used for such notice to the importer, Customs has traditionally used either Customs Form 6451 or Customs Form 29, Notice of Action, for this purpose.

When the regulatory provisions relating to estimation of clean yield content were adopted, they reflected a then-current administrative procedure whereby specially trained Customs inspectors (referred to in some ports as "Wool Administrators") informally examined crude wool shipments and provided an estimate of the clean yield content of the wool to both the importer of record and the Customs inspector (appraiser) on Customs Form 6451. However, the position of "Wool Administrator" was eliminated a number of years ago, Customs no longer estimates the clean yield of wool or hair, and, consequently, Customs Form 6451 is no longer used by Customs to provide notice of clean yield to the importer. Under current procedures, if a clean yield content report is needed for Customs purposes, Customs will sample and analyze the crude wool for clean yield content in a Customs laboratory specializing in wool analysis, and when a Laboratory Report is issued on Customs Form 6415, a copy thereof is sent by Customs to the importer of record. (The only circumstance in which an estimate of clean yield might still be used is when the importer independently chooses to include in the entry documentation an estimate obtained from a public estimator; however, an estimate by such a private sector party is not provided for in the regulations and Customs is not required to accept the estimate for entry purposes.)

In order to ensure that the regulations reflect current requirements and procedures regarding the determination of clean yield, Customs is proposing in this document (1) to remove section 151.72 which provides for estimation of clean yield by non-laboratory method and specifies use of Customs Form 6451 as the means for notification to the importer, and (2) to make conforming changes to other sections of the regulations involving removal of all references: to Customs Form 6451; section 151.72; an examination or estimation procedure (which in the regulatory texts has reference only to a non-laboratory procedure); and importer notification of the results of an examination or estimation procedure. The present regulatory provisions regarding laboratory sampling and analysis (which also provide for analysis by a commercial laboratory under certain circumstances) would thus constitute the sole means under the regulations for determination of clean yield content and would remain unchanged. Finally, no changes to section 151.76 are

proposed in this document because the references therein to examination and notification regarding the grade of wool are sufficiently general as to cover current procedures.

COMMENTS

Before adopting the proposed amendments, consideration will be given to any written comments (preferably in triplicate) timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Customs Service Headquarters, Room 2119, 1301 Constitution Avenue, N.W., Washington, D.C.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*), it is certified that the proposed regulations amendments will not have a significant economic impact on a substantial number of small entities. The proposed amendments merely conform the regulations to present administrative practice and thus would not result in any increased economic impact. Accordingly, these proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 151

Customs duties and inspection, Imports, Examination, sampling and testing, Wool.

PROPOSED AMENDMENTS TO THE REGULATIONS

Accordingly, it is proposed to amend Part 151, Customs Regulations (19 CFR Part 151), as set forth below:

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The authority citation for Part 151 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 8 and 9, Harmonized Tariff Schedule of the United States), 1624. * * *

Subpart E also issued under Additional U.S. Note 2(f) to Chapter 51, HTSUS. * * *

* * * * * * *

2. Section 151.64 is amended by revising the section heading and section text to read as follows:

§ 151.64 Extra copy of entry summary.

One extra copy of the entry summary covering wool or hair subject to duty at a rate per clean kilogram shall be filed in addition to the copies otherwise required.

3. Section 151.70, first sentence, is amended by removing at the end the words ", in which case the clean yield of the wool or hair in such sampling unit shall be estimated as provided for in § 151.72".

4. Section 151.71 is amended by revising paragraphs (a) and (b) to read as follows:

§ 151.71 Laboratory testing for clean yield.

(a) *Test and report by Customs laboratory.* The clean yield of all general samples taken in accordance with § 151.70 shall be determined by test in a Customs laboratory, unless it is found that it is not feasible to test such a sample and obtain a proper finding of percentage clean yield. A report of the percentage clean yield of each general sample as established by the test, or a statement of the reason for not testing a general sample, shall be forwarded to the district director.

(b) *Notification to importer.* Where samples of wool or hair have been tested in a Customs laboratory and the district director has received a copy of the Laboratory Report, Customs Form 6415, the district director shall promptly provide notice of the test results by mailing a copy of that report to the importer.

* * * * * * *

5. Section 151.72 is removed.

6. Section 151.73 is amended by removing from paragraph (a) the words "or a reestimation of clean yield made in accordance with § 151.72(c),".

7. Section 151.73 is further amended by removing from paragraph (b) the words "or reexamination".

8. Section 151.75 is amended by removing the words "and examinations".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: August 10, 1992.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 21, 1992 (57 FR 37917)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–128)

AMERICAN PERMAC, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88–02–00072

Plaintiff moves for summary judgment and Defendant cross-moves for summary judgment. Plaintiff contends because there was no statute or court order suspending liquidation, it is entitled to judgment because its entries were deemed liquidated as entered by operation of law four years after the respective entry dates pursuant to 19 U.S.C. § 1504(d).

Held: The Court concludes that there are no material issues of fact in dispute. This Court's decision in *American Permac, Inc. v. United States*, 10 CIT 535, 642 F. Supp. 1187 (1986), which held that suspension of liquidation is required by law and continues until the ITA publishes the final results of its administrative review, does not collaterally estop Plaintiff from relitigating the deemed liquidated issue because it was interlocutory and not subject to appeal. However, that case has strong precedential value and the reasoning therein is overwhelmingly persuasive. The assessment of antidumping duties by Customs is affirmed. The action is dismissed.

[Upon cross-motions for summary judgment, Defendant's motion granted and Plaintiff's motion denied. The action is dismissed.]

(Dated August 11, 1992)

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr., Sandra Liss Friedman*, and *Frederic D. Van Arnam, Jr.*), for Plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*); of counsel: *Edward N. Maurer*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge*: Plaintiff American Permac, Inc., the importer of the subject merchandise, moves for summary judgment on the ground that Customs' liquidation of the entries in this case pursuant to the United States Department of Commerce's ("Commerce") January 10, 1985 final results of a periodic review of an antidumping finding are void by virtue of the four-year limitation on liquidations under 19 U.S.C. § 1504(d) (1988).

Section 1504(d) provides that any entry of merchandise not liquidated within four years after the date of entry or final withdrawal from warehouse shall be "deemed liquidated" at the amount of duty asserted

at the time of entry by the importer "unless liquidation continues to be suspended as required by statute or court order."

The subject merchandise consists of imported drycleaning machines from the Federal Republic of Germany which were entered in April and June of 1979.[1] The entries were liquidated on April 25, 1986 and May 2, 1986. Protests were timely filed and all liquidated duties have been paid.

Defendant opposes Plaintiff's motion and cross-moves for summary judgment contending that Plaintiff is collaterally estopped from relitigating the § 1504(d) issue by virtue of this Court's determination in *American Permac, Inc. v. United States*, 10 CIT 535, 642 F. Supp. 1187 (1986) ("*API I*"), which involved the same parties and merchandise as the instant case but different entries. There, the Court held that suspension of liquidation is required by statute and continues until the International Trade Administration ("ITA") publishes the final results of its administrative review.

While Plaintiff concedes that the deemed liquidated issue was fully considered in *API I*, it argues that *API I* was not a "final" judgment having preclusive effect in this case. In any event, Plaintiff asserts that the issue was wrongly decided and should be reexamined by this Court.

"Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986)). This Court finds that the are no material facts at issue and Defendants are entitled to judgment as a matter of law.

This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1581(a) (1988).

Prior Decision – API I

API I, decided on August 12, 1986, was the first of three slip opinions issued by Judge Watson in Court No. 85–01–00050. The decision addressed only the "deemed liquidated" issue in that case. The issue was decided first because API obtained leave of Court to brief the issue separately from the other issues in the case and the issue was potentially dispositive of the action if resolved in API's favor. The Court denied API's motion for partial summary judgment, rejecting its argument that the application of the final results of a periodic review of an antidumping finding issued by the ITA to the entries covered by the review was barred by the four-year limitation on liquidations imposed under 19 U.S.C. § 1504(d).

The Court held that "suspension of liquidation was required by statute [19 U.S.C. § 1675(a)] so that § 1504(d) does not bar application of the

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[1] The merchandise was subject to an antidumping order issued by the Treasury Department on November 8, 1972, and became subject to administrative reviews by Commerce after 1980, when the functions of administering the antidumping law were transferred from the Secretary of the Treasury to the Secretary of Commerce. Because the antidumping finding by Treasury remained in effect on January 1, 1980, the effective date of the Trade Agreements Act of 1979, the amount of duties imposed under the finding became subject to periodic review pursuant to 19 U.S.C. § 1675(a) (1988). *See American Permac, Inc. v. United States*, 10 CIT 535, 536, 642 F. Supp. 1187, 1188–89 (1986).

challenged determination to the entries under review." *API I*, 10 CIT at 536, 642 F. Supp. at 1188. Judge Watson decided that suspension continued until the ITA published the final results of its administrative review. *Id.* at 1197. The decision was not appealed.

The second decision reached in Court No. 85–01–00050 was entered on December 1, 1988. *American Permac, Inc. v. United States*, 12 CIT 1134, 703 F. Supp. 97 (1988). There, the Court affirmed the final results of Commerce's periodic review except for Commerce's finding that API did not qualify for a level of trade adjustment. 12 CIT at 1142, 703 F. Supp. at 103–04.

Thereafter, on June 14, 1989, Commerce revised its final results and the Court affirmed them in the third and last decision in Court No. 85–01–00050. *American Permac, Inc. v. United States*, 13 CIT 487, 488, 714 F. Supp. 1244, 1245 (1989). In the revised final results, Commerce granted plaintiffs a level of trade adjustment. This was the final judgment disposing of the entire case, and it was not appealed.

Both parties agree that the only difference between *API I* and the instant case is that in the instant case the merchandise entered between April 12, 1979 and June 20, 1979, while in *API I* it entered between July 1, 1979 and June 30, 1980.

The first issue to be decided by this Court is whether the *API I* determination should be given preclusive effect in the instant action.

Collateral Estoppel

Plaintiff contends that Judge Watson's determination in *API I* does not collaterally estop it from relitigating the matter here because certain elements of collateral estoppel are not present, to wit, that the determination was (1) not a final, appealable judgment and (2) not essential to the ultimate final judgment entered on June 14, 1989.

In order for a judicial determination to have conclusive effect in subsequent litigation with respect to a particular legal issue, a concept known as issue preclusion or collateral estoppel, the issue sought to be precluded from relitigation must have been actually and necessarily determined by a valid final judgment. *Block v. United States*, 4 Fed. Cir. (T) 21, 24–25, 777 F.2d 1568, 1572 (1985); *see* 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4416, at 137–38 (1981) ("Wright"); Restatement (Second) of Judgments ("Restatement") § 27 (1982).[2] The Restatement defines issue preclusion as follows:

> **§ 27 Issue Preclusion – General Rule.**
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

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[2] Our appellate court and this Court have looked to the Restatement of Judgments for guidance on matters concerning issue preclusion. *See, e.g., Block*, 4 Fed. Cir. (T) at 24–25, 777 F.2d at 1572; *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1135 (Fed. Cir. 1985); *Young Engineers, Inc. v. United States*, 2 Fed. Cir. (T) 9, 19, 721 F.2d 1305, 1314 (1983); *PPG Indus., Inc. v. United States*, 14 CIT ___, ___, 746 F. Supp. 119, 133 (1990); *Cabot Corp. v. United States*, 12 CIT 664, 670 n.5, 694 F. Supp. 949, 953 n.5 (1988).

According to the Restatement, a "final judgment" for the purposes of issue preclusion "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement § 13. An important factor in determining the finality of a decision for issue preclusion is whether that decision was ever subject to an appeal. *Block*, 4 Fed. Cir. (T) at 24, 777 F.2d at 1571–72, citing *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *see* Restatement § 13, Comment g;[3] *see also* Wright § 4433, at 315 ("Decisions that could not have been tested by appeal may seem suspect candidates for preclusion"). Section 28 of the Restatement clearly states that relitigation of an issue is *not* precluded when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." *See Cabot Corp. v. United States*, 12 CIT 664, 671, 694 F. Supp. 949, 954–55 (1988) (hereinafter "*Cabot II*").[4]

Cabot II underscores the importance of the appealability factor in determining finality. The plaintiff there challenged the ITA's use of the general availability test to measure subsidies during a periodic review of a countervailing duty order. Because the Court had found the general availability test an unacceptable legal standard in an earlier case, 9 CIT 489, 495, 620 F. Supp. 722, 730 (1985) (hereinafter "*Cabot I*"), the plaintiff argued that the government was precluded from relitigating the matter in the periodic review. In *Cabot I* the Court had remanded the case to the agency, but upon the government's motion for vacatur of part of the decision, the Court granted the motion and affirmed final judgment sustaining the government's countervailing duty determination and order. The final judgment covered all matters except those for which the action had been remanded – thus the final judgment was partial, and it favored the government. The Court in *Cabot II* concluded that "since *Cabot I* culminated in a final judgment from which there was no effective appeal on the merits available to the defendant United States, collateral estoppel does not apply against the government in this [periodic] review." *Cabot II*, 12 CIT at 671, 694 F. Supp. at 954–55.

The Court finds that because the determination in *API I* was an interlocutory order denying partial summary judgment, it was clearly not a "final" appealable judgment within the meaning of the law. *See* 28

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[3] Comment g of § 13 of the Restatement suggests the following guidelines for determining whether the prior decision of an issue is "final" for preclusion purposes:

> [T]he court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered. Thus preclusion should be refused if the decision was avowedly tentative. On the other hand, that the parties were fully heard, that the court supported its decision with a reasoned opinion, *that the decision was subject to appeal or was in fact reviewed on appeal*, are factors supporting the conclusion that the decision is final for the purpose of preclusion.

Restatement § 13, Comment g (emphasis added).

[4] Defendant correctly states that other factors besides the appealability of a judgment are relevant in determining whether a judgment is final for preclusion purposes, such as whether the parties were fully heard and whether the court's decision was supported by a reasoned opinion. *See* Comment g of Restatement § 13; *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Lummus Co.*, 297 F.2d at 89; *Illinois Bell Tel. Co. v. Haines & Co.*, 713 F. Supp. 1122, 1124 (N.D. Ill. 1989). However, no authority cited by Defendant states that preclusion can apply when a judgment is *not* subject to appeal immediately or at some point in the future. *See Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1270 (5th Cir. 1986); *see also* Wright § 4433, at 315–16.

U.S.C. §§ 1291, 1292, and 1295(a)(5) (1988).[5] As an unappealable *partial* summary judgment, the *API I* ruling has no collateral estoppel effect. *See, e.g., Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269–70 (5th Cir. 1986); *Golman v. Tesoro Drilling Corp.*, 700 F.2d 249, 253 (5th Cir. 1983); *Travelers Indem, Co. v. Erickson's Inc.*, 396 F.2d 134, 136 (5th Cir. 1968); 6 *Moore's Federal Practice* paragraph 56.20[3.–4] (2d ed. 1988).

Defendant also argues that Plaintiff could have sought appellate review of this Court's decision on the "deemed liquidated" issue after the Court entered its last order of June 14, 1989, affirming the results of the administrative review. Plaintiff counters that even if the deemed liquidated issue was subsumed in the final judgment of June 14, 1989, it could not have, as a practical matter, appealed the matter because final judgment on the merits favored the Plaintiffs. *See* Wright § 4433, at 317 ("a prevailing party is not allowed standing to appeal unfavorable findings, and the findings do not preclude later litigation of the same issues."); *Cabot*, 12 CIT at 671, 694 F. Supp. at 954–55.[6]

For the reasons below, the Court finds that the June 14 judgment, although final, was not subject to appeal in the sense required for preclusion of the deemed liquidated issue.

First, it is far from clear as to which party prevailed. In Commerce's revised final results which were the subject of the June 14 final judgment, Commerce granted plaintiffs a level of trade adjustment which resulted in an almost 50 percent reduction of the weighted-average dumping margins; on the other hand, it is argued that API did not "win" the case because antidumping margins were still imposed. Even assuming this Court viewed the deemed liquidated determination to have been subsumed in the June 14 final judgment, it would be unjust for this Court to preclude Plaintiff from relitigating the deemed liquidated issue because it reasonably chose not to risk what appears to have been considerable gains in the litigation by appealing the matter.

Second, because the Court views the interlocutory determination in *API I* as nonessential to the final judgment eventually issued on June 14 in *American Permac, Inc. v. United States*, 13 CIT 487, 714 F. Supp. 1244,[7] it follows that the June 14 final judgment cannot somehow make *API I* preclusively final. *See Avondale Shipyards*, 786 F.2d at 1272. While the deemed liquidated issue in *API I* may have been potentially dispositive of the entire case, it was not "essential" to the final judgment because it had no bearing on the merits of that judgment. As discussed, Judge Watson considered and decided the issue independently of the

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[5] Pursuant to 28 U.S.C. § 1291, the courts of appeals, other than the Court of Appeals for the Federal Circuit, have jurisdiction over final decisions of the district courts. The Court of Appeals for the Federal Circuit has jurisdiction over final decisions of the Court of International Trade pursuant to 28 U.S.C. § 1295(a)(5); its jurisdiction over questions of law certified for appeal is found at 28 U.S.C. § 1292(d)(1).

[6] In *Cabot*, this Court noted that "[i]f litigants were permitted to appeal decisions in which they were successful but dissatisfied with the lower court's reasoning, appellate courts would be unduly burdened and presumably asked to issue advisory opinions * * *." 12 CIT at 671 n.6, 694 F. Supp. at 954–55 n.6.

[7] The "essential to the judgment" or "necessarily decided" requirement of collateral estoppel is designed to ensure that the tribunal in the first case took sufficient care in determining the issue sought to be precluded and did not merely decide that issue collaterally or in dicta. Wright § 4421, at 192–94.

other issues in the case. It is also significant that the deemed liquidated issue was not mentioned in either the second (Dec. 1, 1988) or final (June 14, 1989) slip opinions issued in Court No. 85–01–00050.

Suspension of Liquidation by Operation of Law

While collateral estoppel does not apply here, Judge Watson's determination in *API I* has direct precedential value and the reasoning therein is overwhelmingly persuasive. While this Court is not bound by that determination, *see Algoma Steel Corp. v. United States*, 7 Fed. Cir. (T) 154, 157, 865 F.2d 240, 243, *cert. denied*, 492 U.S. 919 (1989), the Court adopts the reasoning therein as sound and applicable to the entries in the instant case.

The pertinent subsections of § 1504 provide as follows:

§ 1504 Limitation on liquidation.

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

(2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; or

(3) the date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if—

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

(2) liquidation is suspended as required by statute or court order; or

(3) the importer of record requests such extension and shows good cause therefore.

(c) [Not relevant here]

(d) Limitation

Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated with 90 days therefrom.

19 U.S.C. § 1504(a), (b) and (d) (1988).

Plaintiff challenges as "clearly erroneous" Judge Watson's finding that liquidation of the entries was suspended by 19 U.S.C. § 1675(a)(1), which requires the ITA to conduct periodic reviews of antidumping orders, and that suspension continues until the ITA publishes the final results of that review. Plaintiff urges that in the absence of a court order or statute *explicitly* suspending liquidation beyond the four year limit in 19 U.S.C. § 1504(d), entries must be liquidated at the rate asserted by the importer at the time of entry. This Court disagrees.

API I turned on the Court's interpretation of 19 U.S.C. § 1675(a). Finding that subsection (2) of that provision "expressly calls for the retrospective application of antidumping review determinations," the Court reasonably concluded that "suspension of liquidation during the pendency of a periodic antidumping review is unquestionably 'required by statute'". *API I*, 10 CIT at 539, 642 F. Supp. at 1191. This conclusion was consistent with controlling precedent.

After first observing that no court had previously addressed a challenge to an ITA review based on § 1504(d), Judge Watson looked to the Federal Circuit's treatment of § 1504(a) and (b) in *Ambassador Div. of Florsheim Shoes v. United States*, 3 Fed. Cir. (T) 28, 748 F.2d 1560 (1984). In *Florsheim*, the court upheld the ITA's authority to apply the final results of its review retrospectively to the entries covered by the review. According to Judge Watson, the *Florsheim* court reasoned that an extension of the period in which liquidation must occur could be grounded upon § 1504(b)(2) "because the administrative review scheme established in 19 U.S.C. § 1675(a) would be frustrated unless it created an implied statutory requirement that liquidation be suspended." *API I*, 10 CIT at 538, 642 F. Supp. at 1191; *see Florsheim*, 3 Fed. Cir. (T) at 31–33, 748 F.2d at 1563–65. Applying the *Florsheim* rationale to the facts before it, the Court stated that

> [t]he basis for extending the liquidation period found in § 1504(b)(2) – that "liquidation is suspended as required by statute" – is also satisfied in this case. In concluding that a periodic review of a countervailing duty determination triggers an implied statutorily required suspension of liquidation, the Federal Circuit in *Florsheim* focused on the "absurd consequences" of holding otherwise. That rationale is unnecessary where, as here, the administrative review is of an antidumping finding. Because 19 U.S.C. § 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations * * *, suspension of liquidation during the pendency of a periodic antidumping review is unquestionably "required by statute".

API I, 10 CIT at 539, 642 F. Supp. at 1191.

The *API I* Court concluded that statutory suspension continued until the ITA *completes* its periodic review because nothing in § 1504(d) directs that entries be deemed liquidated when liquidation is suspended by statute. *Id.*; *see Phillip Bros., Inc. v. United States*, 10 CIT 76, 630 F. Supp. 1317 (1986) (applying this reasoning to § 1504(a) and § 1675(a)(1)). Judge Watson's examination of the legislative history of

§ 1675(a) revealed no evidence that Congress intended to impose the "penalty" of deemed liquidation if the agency failed to complete its administrative review within four years. *API I*, 10 CIT at 540, 642 F. Supp. at 1192. The Court stated that

> [t]he "deemed liquidated" penalty of § 1504 operates irrationally, and if applied in an antidumping context could lead to particularly inequitable assessments, since the amount of deposited duties may bear little relation to actual dumping margins. In that situation it would seem especially critical that parties be guaranteed an adequate means to challenge the basis of the assessments. The scheme for judicial review of agency determinations under the new law, if applicable at all, is ill-suited to that purpose. Congress' failure to address this difficulty, coupled with its clearly expressed expectation that periodic review determinations would provide the basis for antidumping duty assessments on covered entries, persuades the court that Congress intended the statutory suspension of liquidation during a periodic review to override the possibility of deemed liquidation under § 1504(d).

API I, 10 CIT at 546–47, 642 F. Supp. at 1197.

The *API I* Court's reasoning is sound and amply supported by the statutory scheme, legislative history, and case law. All of Plaintiff's arguments here were sufficiently addressed in that case. The law has not changed since that time, and the rationale of *API I* is no less sound now then it was then. Because there is no issue in this case as to any material fact and because the Court finds the reasoning in *API I* to be overwhelmingly persuasive, Defendant is entitled to summary judgment.

This Court does not condone the ITA's failure to liquidate the entries within the time limits of § 1504(d). It is clear that in enacting § 1504 Congress was dissatisfied with Treasury's delays in assessing antidumping and countervailing duties. Nevertheless, Plaintiff is incorrect that Congress intended the 4-year limit on liquidation under § 1504(d) to be the outside limit on all antidumping duty assessments. See *API I*, 10 CIT at 542–44, 642 F. Supp. at 1193–94. If entries involved in a periodic review were to be deemed liquidated by operation of law prior to the completion of the review, Congress' mandate that such reviews be conducted and antidumping duties be assessed and collected when dumping is found would be frustrated. If Congress had meant for § 1504(d) to take precedence over § 1675(a), it would have said so. If and until it does, this Court will follow our appellate court's finding in *Florsheim* that Congress intended § 1504 and provisions of § 1675(a) to "work harmoniously together, and for neither to frustrate the other * * *." 3 Fed. Cir. (T) at 34, 748 F.2d at 1565. While *Florsheim* involved a countervailing duty proceeding, its reasoning is equally applicable to an antidumping proceeding, where pursuant to § 1675(a)(2), antidumping determinations made in periodic reviews "shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties."

Finally, Plaintiff brings to the Court's attention this Court's recent decision in *Nunn Bush Shoe Co. v. United States*, 16 CIT ___, 784 F. Supp. 892 (1992), as support for its interpretation of § 1504(d). That case, however, is factually distinguishable from the instant case. *Nunn Bush* was an action challenging Customs' liquidation of various entries of shoes subject to a countervailing duty order. The Court ruled that Customs improperly liquidated the entries more than four years after the merchandise was entered, because there was no court order or statute suspending liquidation. Importantly, Commerce had issued its final results of the administrative review covering those entries two years earlier. Moreover, while there were injunctions suspending liquidation of some entries, they were lifted prior to the fourth anniversary of their entry. *Id.* at 894. The Court ruled that "the entries were deemed liquidated by operation of law when they became four years old *since the liquidation was not suspended in any way.*" *Id.* at 895 (emphasis added).[8]

In the instant case, unlike *Nunn Bush*, Commerce had not completed the final results of its administrative review on the fourth anniversary date of the subject entries. In *API I*, it was this fact that caused the liquidations to remain suspended by operation of law, pending the publication of the final results in the Federal Register. *Nunn Bush*, therefore, lends no support to Plaintiff's position.

This Court has held that if plaintiffs are dissatisfied with the ITA's delay in complying with the law, the remedy is to seek judicial enforcement of the statutory deadline. *API I*, 10 CIT at 543, 546, 642 F. Supp. at 1194, 1197; *see Nakajima All Co., Ltd. v. United States*, 12 CIT 585, 590–91, 691 F. Supp. 358, 363 (1988). The Court must presume that Plaintiffs were aware of this potential avenue of relief but chose to ignore it.

CONCLUSION

This Court holds that there are no material issues of fact in dispute. Because the Court holds that the liquidation of the entries in this action was suspended by statute pending the completion of the ITA's periodic review, it is ORDERED that Plaintiff's motion for summary judgment is denied, and that Defendant's cross-motion for summary judgment is granted. The assessment of antidumping duties by Customs is affirmed. The action is dismissed.

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[8] The *Nunn Bush* court was apparently aware of *API I* when it issued its ruling, as it is cited in the opinion, but made no attempt to distinguish or comment on it.

(Slip Op. 92–129)

DAIDO CORP., DAIDO KOGYO CO., LTD., AND ENUMA CHAIN MANUFACTURING CO., LTD., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, BARBARA H. FRANKLIN, SECRETARY OF COMMERCE, TIMOTHY J. HAUSER, ACTING UNDERSECRETARY OF COMMERCE FOR INTERNATIONAL TRADE, ALAN DUNN, ASSISTANT SECRETARY OF COMMERCE FOR IMPORT ADMINISTRATION, DEFENDANTS

Court No. 92–07–00429

OPINION AND ORDER

(Dated August 12, 1992)

Appearances:

Tanaka Ritger & Middleton (*H. William Tanaka* and *Patrick F. O'Leary*, Esqs.) for plaintiffs.

Stuart Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Jeffrey M. Telep*, Attorney); *Diane M. McDevitt*, Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, Department of Commerce, for defendants.

[Plaintiffs' application for writ of mandamus held in abeyance; plaintiffs' application for preliminary and permanent injunctions denied.]

NEWMAN, *Senior Judge*:

I

This antidumping duty action has its genesis in the Treasury Department's ("Treasury") 1973 dumping finding in *Roller Chain, Other Than Bicycle, From Japan*, 38 Fed. Reg. 9,926 (April 12, 1973) and plaintiffs' subsequent efforts to obtain revocation of this finding.

In 1977, Treasury published notices of tentative determinations to modify or revoke the dumping finding as to plaintiffs. 42 Fed. Reg. 41517; 42 Fed. Reg. 54043. Those tentative determinations were never finalized, but subsequently Customs conducted so-called "gap" period and below cost sales investigations.

On January 2, 1980, authority to administer the antidumping statute was transferred from Treasury to the Department of Commerce ("Commerce"). However, the "gap" period and below cost sales investigations were never completed by either Treasury or Commerce. Instead, without belaboring the details, Commerce continued to initiate and conduct further administrative reviews on *Japan Roller Chain* and persistent efforts by plaintiffs to obtain final resolution of the revocation issue were unsuccessful.

On August 11, 1988, and after four additional administrative reviews, Commerce again issued a tentative decision to revoke the dumping finding (backdated to April 1, 1983) with respect to plaintiffs, based on the results of the previously reviewed 1981–82 and 1982–83 periods. *Roller Chain, Other Than Bicycle, From Japan; Tentative Determination to Revoke Antidumping Finding in Part*, 53 Fed. Reg. 30,325 (August 11,

1988). However, revocation based on those review periods was never finalized by Commerce. Predicated upon the holding in *Freeport Minerals Co. v. United States*, 776 F.2d 1029 (Fed. Cir. 1985), to the effect Commerce must use current data for a final revocation decision, Commerce decided to conduct an administrative review of the April 1, 1986 – March 31, 1987 period. More than three years passed before Commerce completed the 1986–87 review and on October 3, 1991 published the final results of the 1986–87 review period, *Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 56 Fed. Reg. 50,092 (October 3, 1991). Commerce again found that plaintiffs' dumping margins were *de minimis*. Nevertheless, Commerce still refused to finalize the revocation with respect to plaintiffs because by 1991, the information for the period last investigated (1986–87), was now stale. Hence, Commerce decided that it was required by *Freeport Minerals* to conduct a review for the period up to August 11, 1988, the date of the tentative revocation. *Id.* at 50,093 at comment 1. However, rather than review the period 1987–88, Commerce decided to review the more current April 1, 1990–March 31, 1991 period.

In *Daido Corp. v. United States*, Court No. 91–10–00751, plaintiffs challenged Commerce's failure to revoke the dumping finding based on the 1986–87 review, *Roller Chain, Other Than Bicycle, From Japan*, 56 Fed. Reg. 50,092, 50,093 (Comment 1) (October 3, 1991). That case remains *sub judice*.

On May 22, 1992, and on subsequent dates thereafter, Commerce notified plaintiffs that there would be a delay in the 1990–91 review due to lack of funding. Further compounding plaintiffs' revocation problems, on May 22, 1992 Commerce announced initiation of a new administrative review for the April 1, 1991–March 31, 1992 period (57 Fed. Reg. 21,769), requested by the American Chain Association (the domestics' trade association). Consequently, on May 22, 1992, Commerce sent plaintiffs a 1991–92 review questionnaire with a response deadline of July 6, 1992. Plaintiffs' request of May 27, 1992 to Commerce for deferral of the questionnaire responses pending completion of the 1990–91 review and finalization of the revocation was rejected by Commerce on June 23, 1992.

All of plaintiffs' entries since April 1, 1983 remain unliquidated. Plaintiffs have not been required to make cash deposits for dumping duties on any of the entries.

On July 6, 1992 plaintiffs, Japanese manufacturers and exporters and an American importer subject to the dumping finding, filed this lawsuit bitterly complaining that they have twice satisfied the conditions for revocation, but that the repeated administrative delays have stifled plaintiffs' persistent efforts for over fifteen years to obtain a revocation in accordance with the regulations. Plaintiffs complain that without revocation, they will continue to be subjected to administrative reviews at the request of domestic interested parties; and without timely com-

pletion of the reviews, plaintiffs are prevented from ever obtaining revocation.

II

Plaintiffs, understandably, express fear that in the 1990–91 review they are again threatened with the consequences of bureaucratic delay and *Freeport Minerals* on their revocation efforts. According to plaintiffs, without judicial intervention, the 1990–91 review and final resolution of the revocation question therein will not, due to Commerce's refusal to allocate the necessary funds and the agency's decision to channel its resources into higher priority steel dumping investigations, be completed by Commerce until 1994 and that by then *Freeport Minerals* will again be raised by Commerce to stifle plaintiffs' revocation efforts.

The remedial relief requested, by way of an order to show cause dated July 6, 1992, is a writ of mandamus, judicial supervision of the 1990–91 and 1991–92 administrative reviews, and imposition of deadlines on Commerce for completion of the preliminary and final results of 1990–91 administrative review. Additionally, plaintiffs seek declaratory, injunctive and mandamus relief regarding Commerce's allegedly untimely distribution of 1991–92 period questionnaires to plaintiffs and refusal to defer answers pending resolution of the revocation issue.

On July 30, 1992, the submission of post-hearing briefs by the parties in this matter was completed by plaintiffs' reply brief, which was received by the Clerk on August 3, 1992.

III

There is no dispute as to jurisdiction. In view of the causes of action alleged by plaintiffs for mandamus and an injunction, judicial review under 28 U.S.C. § 1581(c) *after* Commerce completes its 1990–91 and 1991–92 administrative reviews would clearly be "manifestly inadequate." Therefore, the court has jurisdiction of this action pursuant to § 1581(i)(4). *See Matsushita Electric Industrial Co., Ltd. v. United States*, 12 CIT 455, 465, 688 F. Supp. 617 (1988); *Nakajima All Co., Ltd. v. United States*, 12 CIT 189, 682 F. Supp. 52 (1988); *Techsnabexport, Ltd. v. United States*, 16 CIT ___, Slip Op. 92–82 (May 21, 1992). Concerning the "manifestly inadequate" standard and jurisdiction under § 1581(i), see the recent Federal Circuit decision, *Norcal/Crosetti Foods, Inc. v. United States*, ___ F.2d ___, Appeal No. 91–1295 (decided May 4, 1992).

IV

Defendants' long-standing disregard for statutory deadlines in administrative reviews has repeatedly been judicially condemned and required judicial intervention. *See UST, Inc. v. United States*, 831 F.2d 1028, 1032 (Fed. Cir. 1987); *Matsushita Electric Industrial Co., Ltd. v. United States*, 12 CIT 455, 465, 688 F. Supp. 617 (1988). Here, plaintiffs'

urgent need for a writ of mandamus has to a large extent been obviated by Commerce's commitment to plaintiffs and to the court at the hearing on July 8, 1992 to make the necessary allocation of funding to the 1990–91 review and adhere to the following timetable: September 1, 1992 for the preliminary results; November 15, 1992 for the final results. *Tr. of Oral Argument,* July 8, 1992, at 2–3, 16–17. Plaintiffs have accepted the foregoing timetable. Consequently, imposition of the extraordinary remedy of mandamus is deemed unwarranted at this time. However, the court will accede to plaintiffs' request to retain jurisdiction in this case and plaintiffs' application for mandamus will be held in abeyance pending the outcome of Commerce's conformance to the stipulated deadlines for issuing the preliminary and final results of the review. *Cf. Matsushita Electric Industrial Co., Ltd. v. United States*, 12 CIT 455, 688 F. Supp. 617 (1988), *aff'd* 861 F.2d 257 (1988); *Nakajima All Co., Ltd. v. United States*, 12 CIT 189, 682 F. Supp. 52 (1988); *Nakajima All Co., Ltd. v. United States*, 12 CIT 585, 691 F. Supp. 358 (1988); *Nissan Motor Corp. in the USA v. United States*, 10 CIT 820, 651 F. Supp. 1450 (1986); *UST Inc. v. United States*, 10 CIT 648, 648 F. Supp. 1 (1986), *aff'd* 831 F.2d 1028 (Fed. Cir. 1987).

V

The court turns to plaintiffs' request for injunctive relief regarding Commerce's distribution of the 1991–92 administrative review questionnaires to plaintiffs on May 22, 1992 and requiring response by July 6, 1992. Commerce has agreed to an extension of time until July 20, 1992 for plaintiffs' answers to the questionnaires, which extension has now expired.

Plaintiffs predicate their claim of irreparable injury and for "preliminary" and "permanent" injunctive relief on the following grounds: (1) Commerce's distribution of the 1991–92 period questionnaires and refusal to defer answers pending resolution of the revocation issue is, in view of the history of plaintiffs' revocation efforts, arbitrary, capricious, an abuse of discretion and otherwise contrary to law; (2) the bureaucratic failures and delays over the past fifteen years in finalizing and resolving the revocation question have violated not only the antidumping act and regulations, but plaintiffs' Fifth Amendment right to procedural due process; (3) Commerce's established practice of deferring questionnaires in post-tentative revocation date administrative reviews, and the disincentive for Commerce to expeditiously complete the 1990–91 review after receiving answers from plaintiffs for the 1991–92 review; (4) the unnecessary expense of answering the questionnaires before the issue of revocation is resolved – estimated by plaintiffs to be $72,335; (5) Commerce's threats to refuse revocation for plaintiffs' failure to answer the 1991–92 review questionnaires; (6) the distribution of post-tentative revocation date questionnaires violates 19 C.F.R. § 353.54(f) and casts a cloud on the revocation process.

All of these grounds must be rejected.

VI

Regarding plaintiffs' request to enjoin the post-tentative revocation date questionnaires for the 1991–92 review until resolution of the revocation question on the ground of expense, the holdings in *Matsushita Electric Industrial Co. v. United States*, 823 F.2d 505 (Fed. Cir. 1987); *UST, Inc. v. United States*, 831 F.2d 1028 (1987); and *Nissan Motor Co. in the USA v. United States*, 10 CIT 820, 651 F. Supp. 1450 (1986) are adverse to plaintiffs' claim of irreparable injury. Ordinary burdens and expenses associated with antidumping procedures, even those incurred in answering questionnaires pending a final determination to revoke the antidumping finding, do not constitute "irreparable" injury. *Nissan Motor Co. in the USA.*

VII

Plaintiffs' fear that answering the 1991–92 questionnaires will serve as a disincentive for Commerce to complete the 1990–91 review is obviated by defendants' commitment to complete the latter review according to a timetable, *supra.*

VIII

The initiation of the 1991–92 review and distribution of questionnaires to plaintiff do not, *per se*, impair plaintiffs' Fifth Amendment procedural due process rights pertaining to revocation. The several hypothetical scenarios postulated by plaintiffs wherein revocation could be ultimately postponed or denied by Commerce if plaintiffs were to now respond to the questionnaires are not presently before the court and do not support plaintiffs' claim of denial of due process. *See Techsnabexport, supra.*

IX

Plaintiffs further contend that in distributing the 1991–92 questionnaires, Commerce departed from its "established practice" of deferring administrative review questionnaires after the date of notice of tentative revocation and pending the final decision. Thus, plaintiffs point up that following the August 11, 1988 notice of tentative revocation, 53 Fed. Reg. 30325, Commerce deferred the questionnaires to plaintiffs in the three *Japan Roller Chain* administrative reviews in the 1987–1990 period pending completion of the 1986–87 review and resolution of the revocation issue. Further, plaintiffs "believe" that similarly Commerce did not send post-tentative revocation date questionnaires to Tsubakimoto Chain Co., Ltd., another Japanese manufacturer who sought and obtained a revocation of the *Japan Roller Chain* finding in the 1980s. Nonetheless, plaintiffs cite no evidence that the particular questionnaire deferrals referred to were granted by Commerce pursuant to an "established policy." Accordingly, this case is distinguishable from *Katunich v. Donovon*, 8 CIT 297, 299, 599 F. Supp. 985, 986 (1984) (Secretary of Labor had an established judicially approved policy of assessing import injury by comparing "increases of imports" for the year

of separation with the year immediately prior to separation); and *Armco, Inc. v. United States*, 14 CIT ___, ___, 733 F. Supp. 1514, 1530–31 (1990) (Commerce adopted a methodology for allocating foreign producers' countervailable benefits on the basis of the standard fifteen year useful life for steel industry assets).

X

Plaintiffs argue, with superficial plausibility, that sending out a questionnaire for a post-tentative revocation date review is inconsistent with 19 C.F.R. § 353.54(f),[1] since *if* the revocation is finalized, all merchandise entered after the tentative revocation date will be liquidated as entered without any reference to the dumping finding. However, plaintiffs' interpretation of the regulation must be rejected.

The statute and regulations permit revocation of dumping findings under certain conditions, but revocation is discretionary. *Sanyo Electric Co. v. United States*, 15 CIT ___, Slip Op. 91–110 at 3–4 (December 6, 1991); *Toshiba Corp. v. United States*, 15 CIT ___, Slip Op. 91–107 at 3–4 (November 26, 1991). Commerce is not required by the regulation to assume that a tentative decision to revoke will be finalized. Initiation of a post-tentative revocation date review and issuance of questionnaires is consistent with the regulation and does not require Commerce to postpone distributing questionnaires pending completion of an administrative review. *See UST*, 10 CIT at 652–53, *Nissan*, 10 CIT at 821–22, and *Matsushita*, 12 CIT at 465–66. In sum, the regulation relied on by plaintiffs merely provides that if a dumping finding is revoked, merchandise entered after the notice of tentative revocation must be liquidated without antidumping duties; the regulation has no bearing on post-tentative revocation administrative reviews or questionnaires.

In summary, there is no basis in law or equity for enjoining Commerce from requiring plaintiffs to answer the 1991–92 review questionnaires, nor does Commerce have any statutory or regulatory mandate to refrain from distributing the questionnaires to plaintiffs at this time. Plaintiffs' response to the questionnaires within a reasonable time after the issuance of this order should not unduly hinder or delay the 1991–92 review, and therefore the issue of retaliation for failure to answer the questionnaires should not arise. In any event, should plaintiffs claim during the pendency of this action that the alleged threat of retaliatory refusal to revoke for failure to answer the questionnaires by the extended deadline has materialized in the course of the 1990–91 review, this court will reconsider plaintiffs' requested injunctive and mandamus relief for such retaliation.

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[1] This regulation provides that "ordinarily, a revocation * * * will be effective with respect to all merchandise which is the subject of the revocation * * * entered, or withdrawn from warehouse, for consumption on or after the date on which the 'Notice of Tentative Determination to Revoke or Terminate' is published in the Federal Register."

ORDER

Accordingly, it is hereby ORDERED:

(1) Plaintiffs' request for a writ of mandamus is held in abeyance pending timely receipt by this court of the preliminary and final results of the 1990–91 review in accordance with the timetable referenced above. In the event that Commerce should fail to comply with the timetable, an appropriate writ of mandamus will then be reconsidered;

(2) Plaintiffs' applications for injunctive relief or alternatively, mandamus to defer questionnaire responses for the 1991–92 review and to address Commerce's threat to deny revocation in retaliation for plaintiffs' nonresponse is denied at this time.

(Slip Op. 92–130)

JUNIOR GALLERY, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–02–00271, etc., per attached schedule

JUNIOR PORTRAIT, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–03–00427, etc., per attached schedule

MISS GALLERY, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–08–01143, etc., per attached schedule

YOUNG GALLERY, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84–08–01147, etc., per attached schedule

MEMORANDUM OPINION AND ORDER

[Plaintiff moves to consolidate cases formerly suspended under a test case, but not settled when test case settled. Government moves to designate new cases as test cases, in dispute over whether plastic or other coating "visibly affects" the surface of various fabrics used in outerwear. *Held*: These cases would be more efficiently disposed of by consolidation than by re-suspension under another test case. Plaintiffs motion for consolidation granted; government's motion to designate test cases denied. The cases listed on the attached Schedule shall be consolidated under *Junior Gallery, Ltd. v. United States*, Court No. 84–02–00271.]

(Dated August 13, 1992)

Barnes, Richardson & Colburn, (*Sandra Liss Friedman*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-In-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Nancy M. Frieden*) for defendant.

INTRODUCTION

MUSGRAVE, *Judge*: Plaintiff moves to consolidate cases formerly suspended under *One Up Fashions v. United States*, Court No. 87–03–00509, which was settled on an agreed statement of facts (judgment entered April 23, 1990). Defendant moves to designate several new cases, captioned above, as test cases. The Court finds that in the interest of a "just, speedy, and inexpensive determination" of these cases, consolidation is in order. USCIT Rule 1.

DISCUSSION

Rule 42(a) of this Court provides that cases may be consolidated when actions involving a common question of law or fact are pending before the court. USCIT Rule 42(a). Since the majority of these cases were previously suspended under the test case *One Up Fashions*, it is clear that they all have the same question of law or fact in common. The cases all concern whether various raincoats, winter coats and other outerwear are properly classified under item 356.76, TSUS. While all the cases deal with outerwear garments, seven fabrics are involved, but no single case involves all of the disputed fabrics. Almost all issues concerning classification have been agreed to by the parties or decided by the Court in prior test cases. As stated by plaintiff, the remaining question is, "[d]oes the coating visibly and significantly affect the surface of the fabric?" Plaintiffs Response in Opposition to Defendant's Motion for Test Case Designation ("Plaintiffs Response"), at 2.

Two recent cases before the Court discussed test case designation and consolidation. In *Generra Sportswear, Inc. v. United States*, 16 CIT ____, Slip Op. 92–62 (April 28, 1992), the Court severed an action, designated it a test case and suspended 36 actions under it. The Court compared test case designation and consolidation:

> Both consolidation and the test case/suspension procedures serve to achieve economies of time, effort and expense, and to promote uniformity of decisions. The two procedures, however, differ in several material respects. With consolidation, the various actions with the common question of law or fact are merged into a single consolidated action. Thus, the final decision in the consolidated action has binding legal effect on all the merged actions. On the other hand, in the test case/suspension procedure, the test case and the suspended actions maintain their separate identities. The result is that the final decision in the test case is not necessarily legally binding on the suspended actions.

Generra Sportswear, 16 CIT at ____, Slip Op. 92–62 at 4.

The present cases differ from *Generra* primarily in the fact that in *Generra*, plaintiff asked for test case designation and the government did not object. In this case, plaintiff requests consolidation, while the government argues that a test case designation would be more appropriate. In addition, the factual issues to be decided in *Generra* were apparently more complex: three factual scenarios were common to all the cases, but each would have had different consequences on the outcome

of the suspended cases. Because in this case a single discreet factual issue needs to be decided, varying only in the type of garment involved, test case designation is not preferable to consolidation. The Court, or the parties if they decide to settle these cases, needs to decide whether certain fabric treatments "visibly affect" the outer surface of the garments. Because of the similarity of the fabrics involved, the same witnesses and the same tests could be used *seriatim* to decide the issue for each fabric. *See*, Plaintiffs Motion for Consolidation or, Alternatively, for Joint Trial, at 1. In *Generra*, the factual issues were not so similar between the cases. Each different scenario involved imports from different countries, with different ramifications on the outcome of the case depending on the resolution of the issue particular to imports from that country.

The second recent case concerning consolidation was *Peg Bandage, Inc. v. United States*, 16 CIT ___, Slip Op. 92–63 (May 5, 1992). In that case, the Court decided *sua sponte*, with the parties' consent, to consolidate a test case with two cases suspended under it. The main issue there concerned the classification of bandages made in the United States but processed in Haiti and reimported. Plaintiff filed similar complaints in each of the actions which alleged the same classification, but for subsequent entries. In the cases at bar, plaintiff has filed similar complaints, arguing for the same classification, and the government has responded with boilerplate answers arguing to uphold the initial classification.

In *Peg Bandage*, the Court proposed consolidating the cases, but there was no response from the parties.

Peg Bandage noted that "when actions involving a common question of law or fact are pending before the Court, the Court may determine which procedure – consolidation or test-case/suspension – will best avoid unnecessary costs or delays." *Peg Bandage*, 16 CIT at ___, Slip Op. 92–63 at 4. Although the Court cautioned against consolidating numerous cases resulting in "'an unwieldy and chaotic proceeding,'"(*Morey Machinery Co. v. United States*, 69 Cust. Ct. 303, 305, 349 F. Supp. 1017 (1972), *cited by Peg Bandage*, 16 CIT at ___, Slip Op. 92–63 at 4–5) or one that would "complicate discovery, make trial preparation overly burdensome and strain the Court's judicial resources with a trial of several month's duration," (*Generra Sportswear*, 16 CIT at ___, Slip Op. 92–62 at 4, *cited by Peg Bandage*, 16 CIT at ___, Slip Op. 92–63 at 5) the Court does not believe that such concerns are well-founded in this case.

Government counsel, Customs officials and plaintiff's counsel have been handling these cases for several years. The Court has expertise and caselaw applicable to the factual question which must be decided. In addition, the question to be decided is a narrow one, which all the parties have treated before. The Court sees no reason why these cases, all related intimately, cannot be treated as one, admittedly large, case, to be tried or settled in one fell swoop. The Court is led to this conclusion by

the prior history of most of these cases, both administratively and before the Court.

When the test case under which these cases were previously suspended was settled, these cases should also have settled. However, rather than use the test case procedure to facilitate the disposition of the suspended cases, the government decided to go over each case in detail, to question issues that had already been agreed on by the parties and to force plaintiffs to provide information they had already submitted. As plaintiff now argues. "[i]f the government were allowed to proceed with a test case, none of the cases suspended thereunder would necessarily be decided in accordance with the test case and plaintiff could still be faced with proving the same case again and again." Plaintiff's Response, at 3. It is the Court's experience, in light of the fact that plaintiff has had to relitigate some of these formerly suspended cases twice, that plaintiff would likely be forced to retry the proposed suspended cases if a third test case is designated.

Therefore, the Court is reluctant to suspend these cases once again. "The purpose of suspension is not to create a reservoir of future litigation or to preserve actions for last-minute revivals. Its purpose is to encourage disposition in accordance with the test case." *Intercontinental Fibers, Inc. v. United States*, 2 CIT 133, 135 (1981) *cited by Generra Sportswear, Inc. v. United States*, 16 CIT ____, Slip Op. 92–62 at 5. In these cases, the Court does not believe that suspension would aid in the conclusive determination of the cases to be suspended, based on the Court's prior experience. *See, H. H. Elder & Co. v. United States*, 69 Cust. Ct. 344, 345, C.R.D. 72–28 (1972). Because the cases would all be conclusively decided if consolidated, consolidation is the more efficient method of disposal. Plaintiff's motion for consolidation is hereby granted and the government's motion to designate as a test case is denied. The cases listed on the attached Schedule shall be consolidated under *Junior Gallery, Ltd. v. United States*, Court No. 84–02–00271.

[Schedule of cases to be consolidated attached:]

SCHEDULE OF CASES TO BE CONSOLIDATED

Court No.	*Plaintiff*	*Court No.*	*Plaintiff*
84-02-00271**	Junior Gallery, Ltd.	88-03-00225	Junior Portrait, Ltd.
84-05-00628	Junior Gallery, Ltd.	88-07-00511	Junior Portrait, Ltd.
84-09-01324	Junior Gallery, Ltd.	88-07-00512	Junior Portrait, Ltd.
84-11-01636	Junior Gallery, Ltd.	88-08-00623	Junior Portrait, Ltd.
85-01-00158	Junior Gallery, Ltd.	88-12-00932	Junior Portrait, Ltd.
85-02-00257	Junior Gallery, Ltd.	89-07-00388*	Junior Portrait, Ltd.
85-03-00427	Junior Gallery, Ltd.	90-01-00030*	Junior Portrait, Ltd.
85-08-01007	Junior Gallery, Ltd.	90-12-00692*	Junior Portrait, Ltd.
85-11-01626	Junior Gallery, Ltd.	84-08-01143	Miss Gallery, Ltd.
86-01-00051	Junior Gallery, Ltd.	84-12-01774	Miss Gallery, Ltd.
86-05-00660	Junior Gallery, Ltd.	85-09-01223	Miss Gallery, Ltd.
86-07-00952	Junior Gallery, Ltd.	86-03-00289	Miss Gallery, Ltd.
86-09-01097	Junior Gallery, Ltd.	86-08-01013	Miss Gallery, Ltd.
87-01-00024	Junior Gallery, Ltd.	86-09-01187	Miss Gallery. Ltd.
87-04-00604	Junior Gallery, Ltd.	87-01-00116	Miss Gallery, Ltd.
87-05-00644	Junior Gallery, Ltd.	87-08-00856	Miss Gallery, Ltd.
87-06-00713	Junior Gallery, Ltd.	88-02-00108	Miss Gallery, Ltd.
87-08-00839	Junior Gallery, Ltd.	88-0[illegible]-00544	Miss Gallery, Ltd.
87-11-01108	Junior Gallery, Ltd.	88-08-00621	Miss Gallery, Ltd.
87-12-01187	Junior Gallery, Ltd.	88-12-00934	Miss Gallery, Ltd.
88-04-00262	Junior Gallery, Ltd.	89-03-00115	Miss Gallery, Ltd.
88-08-00618	Junior Gallery, Ltd.	89-10-00554*	Miss Gallery, Ltd.
88-12-00933	Junior Gallery, Ltd.	90-07-00333*	Miss Gallery, Ltd.
89-03-00112	Junior Gallery, Ltd.	90-09-00486*	Miss Gallery, Ltd.
89-07-00392	Junior Gallery, Ltd.	90-12-00691*	Miss Gallery, Ltd.
89-09-00509	Junior Gallery, Ltd.	84-08-01147**	Young Gallery, Ltd.
89-12-00672	Junior Gallery, Ltd.	85-02-00260	Young Gallery, Ltd.
90-05-00261*	Junior Gallery, Ltd.	85-06-00758	Young Gallery, Ltd.
90-12-00690*	Junior Gallery, Ltd.	85-08-01115	Young Gallery, Ltd.
84-03-00427	Junior Portrait, Ltd.	85-10-01503	Young Gallery, Ltd.
84-08-01145	Junior Portrait, Ltd.	85-11-01625	Young Gallery, Ltd.
84-12-01754	Junior Portrait, Ltd.	86-07-00955	Young Gallery, Ltd.
85-03-00366	Junior Portrait, Ltd.	86-09-01188	Young Gallery, Ltd.
85-05-00681	Junior Portrait, Ltd.	87-01-00119	Young Gallery, Ltd.
85-09-01232	Junior Portrait, Ltd.	87-03-00501	Young Gallery, Ltd.
85-11-01685	Junior Portrait, Ltd.	87-06-00716	Young Gallery, Ltd.
86-04-00506	Junior Portrait, Ltd.	87-07-00787	Young Gallery, Ltd.
86-05-00625	Junior Portrait, Ltd.	87-08-00855	Young Gallery, Ltd.
86-05-00626	Junior Portrait, Ltd.	87-11-01109	Young Gallery, Ltd.
86-07-00884	Junior Portrait, Ltd.	88-02-00080	Young Gallery, Ltd.
86-07-00951	Junior Portrait, Ltd.	88-05-00358	Young Gallery, Ltd.
86-09-01235	Junior Portrait, Ltd.	88-06-00456	Young Gallery, Ltd.
86-11-01459	Junior Portrait, Ltd.	88-07-00513	Young Gallery, Ltd.
87-01-00057	Junior Portrait, Ltd.	88-08-00617	Young Gallery, Ltd.
87-06-00707	Junior Portrait, Ltd.	88-08-00644	Young Gallery, Ltd.
87-11-01064	Junior Portrait, Ltd.	88-12-00936	Young Gallery, Ltd.
88-02-00113	Junior Portrait, Ltd.	90-01-00031*	Young Gallery, Ltd.

*Cases which have not been assigned, but which shall also be consolidated.

**Cases which were omitted from Plaintiff's schedule, but which shall also be consolidated.

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